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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 439-440

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

PETITION OF UNIVERSAL OIL PRODUCTS COMPANY FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Of Counsel.

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Intervenor-Respondent.

PETITION OF UNIVERSAL OIL PRODUCTS COMPANY FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Universal Oil Products Company, prays that writs of *certiorari* issue to the United States Court of Appeals for the Third Circuit to review (a) a final judgment of said Court of Appeals entered July 6, 1948, setting aside judgments of affirmance in petitioner's favor rendered in said court in 1935; (b) certain portions of a final order of said court entered October 27, 1948, taxing costs; (c)

certain portions of an interlocutory order of said court entered June 20, 1947, and (d) an interlocutory order of said court entered April 6, 1948, all leading up to the final judgment.

Said final judgment and said orders purported to be entered in proceedings captioned in former consolidated causes in said court entitled "Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee", Nos. 5648 and 5546 (hereinafter referred to as the "*Root* case").

A determination of the Court of Appeals in earlier phases of this matter was reviewed and reversed by this Court on June 10, 1946, in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575.

A certified transcript of the record of the proceedings before the Court of Appeals since June 10, 1946 (*i.e.* proceedings since the last review by this Court) is furnished herewith in compliance with Rule 38 of this Court. Your petitioner is submitting simultaneously herewith a motion for leave of this Court to dispense with the printing of the record upon the consideration of this petition for writs of *certiorari*.* Reference is hereby made to the certified transcript for the purposes of this application with the same force and effect as if printed and filed herewith.

Jurisdictional Statement.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The final judgment of

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*For the convenience of the Court, the judgment and orders sought to be reviewed are printed in full and annexed hereto as an appendix.

which review is sought was entered on July 6, 1948,* and the orders, of portions** of which review is sought, were entered on June 20, 1947, April 6, 1948, and October 27, 1948, respectively.

Summary and Short Statement of Matter Involved.

As more fully appears elsewhere herein, the Court of Appeals for the Third Circuit has assumed jurisdiction and taken action purportedly in the *Root* case, heard and determined on appeal in 1935 by the said Court of Appeals (*cert. den.* 296 U. S. 626).

The history of the original litigation in the *Root* case and the steps taken in this proceeding anterior to the previous review by this Court are extensively and cogently recounted in the opinion of this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575, 576-80, as follows:

> "Petitioner, Universal Oil Products Company, is a patent-holding and licensing company. In 1929 and 1931, it brought suits for infringement against the Winkler-Koch Engineering Co.*** and the Root Refining Company, respectively. The suits were consolidated, the validity of the patents sustained,

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*By order of this Court dated September 9, 1948, the time of your petitioner to file this petition for writs of *certiorari* with respect to said final judgment was extended to and including December 1, 1948.

**Review is sought of those portions of the order entered June 20, 1947, which directed petitioner to show cause why the judgments of affirmance of the Court of Appeals, entered June 20, 1935, should not be set aside and vacated, and those portions of the order entered October 27, 1948, which directed the taxation of costs against petitioner. The entire order of April 6, 1948, is sought to be reviewed.

***This defendant was never served and does not appear anywhere in the litigation.

and decrees for their infringement entered. 6 F. Supp. 763. The Circuit Court of Appeals for the Third Circuit, in an opinion by Judge J. Warren Davis, affirmed the decrees, 78 F. 2d 991, and this Court, in October, 1935, denied *certiorari*. *Root Refining Co.* v. *Universal Oil Products Co.*, 296 U. S. 626. Both before and after the decision in the *Root* case, Universal started similar infringement suits against other oil companies. Universal invoked the Root decisions as *res judicata* against some of these companies. It maintained that, although these companies had not been parties of record in the *Root* suit, they were members of a 'patent club,' to which Root belonged and which had been formed to pool money for the defense of any member of the 'club' in an infringement suit against it, and that the *Root* case had been defended by the attorneys for the 'patent club.' Universal contended that these circumstances made the other oil companies substantial parties to the Root litigation and as such bound by its outcome.

"On June 2, 1941, during the pendency of these latter cases, attorneys who had represented Root and were representing the other oil companies advised the attorneys of the petitioner that on June 5, 1941, they would bring to the attention of the judges of the Third Circuit Court of Appeals the circumstances surrounding the appeal in the *Root* case, and, more particularly, the relations of one Morgan S. Kaufman to the outcome of that appeal, and invited petitioner's attorneys to attend. At the hearing on June 5, the moving attorneys suggested, in substance, that testimony taken at the trial

of Judge Davis pointed to bribery of Judge Davis by Kaufman to secure a decision favorable to Universal in the *Root* appeal. They urged an investigation of the questionable features surrounding affirmance of the *Root* decree, but expressed doubt as to the capacity in which they could formally make such a request of the Court. Their difficulty was due to the fact that after this Court had denied *certiorari* in the *Root* case, Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the law suit.* The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case. And so their attorneys, who were the attorneys in the *Root* litigation and the moving attorneys in the present proceedings, could not move on their behalf to have the *Root* decree vacated. But these other oil companies had an interest in the *Root* decree since it might be used in pending cases to their disadvantage. Universal offered to consent to a reargument of the *Root* case and to preserve to the Root Company the benefits of the existing agreement, even if Universal should prevail upon reargument. Throughout these proceedings Universal stood ready to carry out this offer, but nothing ever came of it, presumably because Root was not represented at these hearings and the other oil companies were not parties of record in the original litigation.

"The dilemma of the attorneys who initiated these proceedings to set aside a fraudulent judgment

*This settlement was effectuated as of April 1, 1939.

but could not speak for any client prepared to come before the court as a party in interest, was resolved by a suggestion from the presiding judge of the Circuit Court of Appeals. The suggestion was that the court would accept the services of these attorneys as *amici curiae*. Accordingly, they offered themselves in that role. Upon their acceptance as such by the court they asked for the appointment of a master to investigate the *Root* appeal. While they thus proceeded as *amici* they stated quite candidly that they were also concerned with the interests of their clients, the oil companies in pending litigation. As a matter of law, however, their status was only that of *amici*, for their clients did not subject themselves to the court's jurisdiction. The relation of these lawyers to the court, after it recognized them as *amici*, remained throughout only that of *amici*.

"A master was appointed and he conducted an extensive investigation. He examined records in the possession of the United States Attorney for the Southern District of New York, the records of proceedings before a Philadelphia grand jury, bank records, and various statements of interested parties. From this mass of material, he selected those documents which he deemed appropriate for submission to the inspection of the *amici* and of counsel for Universal. Witnesses were also heard and petitioner was given the right to cross-examine. But the investigation was not governed by the customary rules of trial procedure. Petitioner's counsel duly excepted to the manner in which the investigation was being conducted, 'if it were to involve any property rights of our clients, including the validity of any

judgment. . . .' The master evidently did not view the proceedings in the light of an adversary litigation. He ruled 'that the investigation—for that is all it is—should [not] be conducted strictly according to the rules of evidence in litigation.' At the conclusion of this investigation, the master rendered a report in which he concluded 'that there was in connection with this case such fraud as tainted and invalidated the judgments' in the *Root* appeal.

"On the basis of this conclusion, the Court of Appeals on June 15, 1944, entered an order directing that the judgments be vacated and the cause be reargued. The relief thus granted was that to which petitioner had consented before the investigation got under way. On July 24, 1944, the *amici* applied to the court below for an order directing that the expenses and compensation of the master be taxed against Universal. In view of the fact that Universal appeared and participated in the investigation before the master, with acquiescing knowledge that the master's fees and expenses would be assessed by the court, we do not disturb the taxation of the master's fees and expenses. The *amici* also asked the Court to assess against Universal their expenses and reasonable attorneys' fees. The court awarded $54,606.57 in expenses, part of which was for the amount they had advanced in payment to the master, and $100,000 as compensation for their services. These amounts had in fact already been paid to the attorneys by their oil company clients. The awards thus constituted an order for reimbursement of the clients by Universal. The case was heard by the court *en banc*, and two of the judges thought that

> the *amici* were only entitled to a compensation of $25,000. 147 F. 2d 259. Questions of importance in judicial administration were obviously involved by the disposition below, and so we brought the case here. 324 U. S. 839."

The order of the Court of Appeals awarding compensation and expenses, referred to in the quotation above, was reversed by this Court (328 U. S. 575).

Subsequent to the decision of this Court, the Court of Appeals (June 20, 1946), through its clerk, invited suggestions from your petitioner and *amici curiae,* therein referred to, as to "the present status of the appeals" in the *Root* case "now that the petitions for writs of certiorari have been disposed of by the Supreme Court." Both petitioner and said *amici curiae* submitted letters to the clerk setting forth their respective interpretations of the decision of this Court.

Before the Court of Appeals held a further hearing in the matter, Skelly Oil Company* filed a petition in that court (October 1946) for leave to intervene and participate in any further proceedings in the Court of Appeals or the

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*Skelly Oil Company was the defendant in an action commenced by your petitioner's predecessor over twenty years ago for infringement of certain letters patent not involved in the *Root* case. Judgment in favor of your petitioner was affirmed upon appeal. Since about 1927 an accounting had been going on in that case. After the Court of Appeals had set aside the judgments of affirmance in the *Root* case (June 15, 1944), Skelly sought to interpose in its litigation with petitioner's predecessor a supplemental defense of unclean hands, claiming a vitiation of plaintiff's recovery therein, all in spite of the fact that no claim had ever been advanced by Skelly or anyone else that the judgments of the District Court or of the Court of Appeals in that case were other than impeccable and unimpeachable.

District Court. None of the allegations in a proposed so-called "Pleading" annexed to Skelly's petition for intervention was directed toward any issues in the *Root* case.

A hearing before the Court of Appeals took place on December 19, 1946, to consider further proceedings in the light of the decision of this Court in 328 U. S. 575. At that hearing petitioner moved the court, upon all of the proceedings theretofore had and upon the settlement agreements between it and Root, for an order vacating the orders of the Court of Appeals (June 15, 1944) setting aside the judgments of affirmance in the *Root* case, but agreed that the *Root* case be dismissed by the District Court as moot.* Petitioner also opposed the intervention of Skelly Oil Company. *Amici curiae* urged that the orders, setting aside the judgments of affirmance for fraud, should not be disturbed.

On June 20, 1947, the Court of Appeals entered orders with respect to the matters submitted at the December 19, 1946, hearing. These orders:

(a) *vacated its orders of June 15, 1944* (which had set aside the judgments of affirmance in the *Root* case);

(b) directed your petitioner to show cause, if any there might be, before the Court of Appeals on October 13, 1947, why the judgments of affirmance in the *Root* case should not be set aside and vacated "by reason of

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*Besides the settlement referred to in the opinion of this Court (p. 5, *supra*) entered into in 1939, petitioner and Root entered into a further general settlement in July 1944 providing, *inter alia,* for a dismissal of the *Root* case. Furthermore in May 1944 this Court, in *Universal Oil Co.* v. *Globe Co.,* 322 U. S. 471, had held one of the patents involved in the *Root* case invalid and the other not infringed by the same process accused in the *Root* case. The patent not invalidated in the *Globe* case expired in 1938. For all these reasons petitioner urged upon the Court of Appeals that the *Root* case was wholly moot.

alleged fraud and corruption practiced upon this court by Universal Oil Products Company or those acting on its behalf";

(c) directed that Skelly Oil Company (which had never been a party to the *Root* case or interested in any of the original issues thereof) be permitted to intervene as prayed, *i.e.*, "to participate in any further proceedings in this Court [Court of Appeals] or in the district court on the question whether there should be a dismissal for fraud"; and

(d) authorized the Attorney General or some member of his staff designated by him to appear as *amicus curiae*.

Shortly after these orders were entered, *amici curiae*, who had originated the proceedings in 1941, formally withdrew from the proceeding, with the approval of the Court of Appeals (July 30, 1947).

At about the same time, three representatives of the Department of Justice filed their appearances in this proceeding on behalf of the United States, "as *amicus curiae*".

The hearing on the order to show cause originally returnable October 13, 1947, was adjourned from time to time and did not take place, even on preliminary aspects, until January 22, 1948.

On January 16, 1948, the Chief Justice of the United States designated the Honorable Morris A. Soper, the Honorable John C. Mahoney and the Honorable E. Barrett Prettyman to sit as the Court of Appeals for the Third Circuit in further proceedings in this matter and in one other matter.

In the spring of 1948, Skelly Oil Company paid $225,000 to petitioner's predecessor in settlement of its said patent

litigation pending in Delaware and, with leave of the Court of Appeals, withdrew as intervenor in these proceedings.

In the meantime (December 30, 1947) William Whitman Company, Inc., the present intervenor-respondent, petitioned the Court of Appeals for leave to intervene in these proceedings.* Over the opposition of your petitioner, the intervention was permitted by order of the Court of Appeals entered April 6, 1948.

In the same order, the Court of Appeals *sua sponte* "formulated" certain charges made against your petitioner. The charges were not formulated as a result of any formal pleadings filed by any "parties" before the court or in any justiciable case or controversy within the meaning of the federal Constitution, but were drawn up by the Court of Appeals as a result "of the report of the special master [in the earlier investigation condemned by this Court in 328 U. S. 575] and the allegations of wrong-doing set forth by the United States as amicus curiae and by the William Whitman Company." The order provided in part as follows:

> "* * * and to that end sets forth the charges that have been made and are to be tried as follows:
>
> "(a) Whether Judge J. Warren Davis' action in these cases was influenced by the expectation of gain or favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman.

*The Whitman Company, on December 28, 1946, had commenced litigation against your petitioner in the District Court of the United States for the District of Delaware in which it was claimed that Whitman had been induced to enter into a license agreement with petitioner upon the representation that the judgments of affirmance in the *Root* case rendered in 1935 were valid.

"(b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of $10,000 to one Charles Stokley, a cousin of Judge Davis, were the means whereby Judge Davis was compensated in whole or in part for his decision favorable to Universal Oil Products Company in these cases, and whether certain other transactions between Judge Davis and Morgan S. Kaufman during the period 1935 to 1938 allegedly related to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice.

"(c) Whether Morgan S. Kaufman was employed or retained by Universal Oil Products Company in connection with these cases and, if so, whether the purpose of such employment or retainer was the expectation of Universal Oil Products Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with these cases."

The Court of Appeals for the first time directed that the trial of the charges

"be consolidated with the trial of the charges set forth in the order of this court passed this day in Case No. 6459, American Safety Table Company v. Singer Sewing Machine Company,* to the follow-

*That case was a patent infringement suit brought in the Eastern District of Pennsylvania resulting in a decree in favor of the defendant and dismissing the plaintiff's complaint. Upon

ing extent, that is to say, the evidence in Cases Nos. 5648 and 5546, Root Refining Company v. Universal Oil Products Company shall first be taken and the privilege shall be accorded to Counsel for the respective parties in Number 6459 to cross examine the witnesses if they so desire, and that said testimony, when completed, shall be stipulated and accepted by counsel in Number 6459 as testimony to be considered in that case, and thereafter additional testimony may be taken in Number 6459, if counsel for either party or counsel for the United States, amicus curiae, so desire."

In no other respect was the proceeding at bar "consolidated" with the American Safety Table Company case.

Hearings commenced on May 10, 1948, and testimony was taken, by and in the presence of the Court of Appeals, from day to day for ten consecutive court days. The facts were bitterly disputed; petitioner protested, and still protests, its innocence; no direct or circumstancial evidence,

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appeal, the decision of the District Court was reversed by the Court of Appeals for the Third Circuit, 95 F. 2d 543; *cert. den.* 305 U. S. 622. In September, 1944 (after the Court of Appeals had set aside its judgments of affirmance in the *Root* case), the defendant made an application to the Court of Appeals for a recall of its mandate and for a reargument of the case upon the merits based upon the alleged disqualification of certain judges who heard the appeal. Arguments upon the issues raised by that application were heard by the Court of Appeals on March 6, 1945, but decision was withheld pending a decision by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575. On June 20, 1947, the Court of Appeals entered an order in that case directing American Safety Table Company to show cause why the relief prayed for by Singer should not be granted and authorized the Attorney General of the United States or his representative to appear *amicus curiae*.

we shall argue, sustained the charges of corruption. No written briefs were permitted by the Court of Appeals, but elaborate oral arguments were made on May 31 and June 1, 1948.

Root Refining Company, the only party to the *Root* case except petitioner, was not sought to be subjected to the process of the court and, as had been the fact since the commencement of the investigation in 1941, Root failed and refused to appear or participate. Those before the court were, exclusively, (a) the United States, *Amicus Curiae*, which the court ruled *not* to be a "part of the case", (b) the Whitman Company, a stranger to the *Root* case, which was permitted to intervene, not with respect to any issue in the *Root* case but solely with respect to whether the judgments of affirmance in the *Root* case in 1935 had been obtained by fraud, and (c) your petitioner. Not one word, whether of testimony or of argument, dealt with any issue in the *Root* case.

Under these circumstances, petitioner argued (besides a vigorous defense on the merits) *not* that the court lacked power to conduct an investigation of its own integrity, but that no judgment could be entered in such an anomalous proceeding which might deprive petitioner of its property, particularly *vis-a-vis* others in actual or potential litigation with petitioner, including especially the Whitman Company. Petitioner urged that, in any event, it was entitled to a trial by jury.

Not only were the "parties" before the court exclusively as just described, but petitioner argued there were no pleadings or justiciable issues before the court in a case or controversy under the federal Constitution.

Nevertheless, the Court of Appeals overruled all such objections and conducted twelve hearings, including argu-

ments, in three weeks during which three-quarters of a million words were taken and over 300 exhibits received. Five weeks later (July 6, 1948) the Court of Appeals filed an opinion (169 F. 2d 514) and a "Summary of the evidence and findings of fact prepared by the court", and entered a final judgment which directed that the mandates of the Court of Appeals issued in the *Root* case on October 30, 1935, be recalled, that the judgments of the Court of Appeals affirming the decrees of the District Court therein be vacated, and that the cases be remanded to the District Court with directions to vacate its judgment therein and dismiss the bills of complaint. The judgment also provided that costs, including those in American Safety Table Company versus Singer Sewing Machine Company,

> "be paid, *four-fifths* by Universal Oil Products Company and one-fifth by the American Safety Table Company."

Thereafter, United States of America, *Amicus Curiae,* and Singer Sewing Machine Company made applications to the Court of Appeals for the allowance of counsel fees, costs and expenses.

The Whitman Company, the intervenor-respondent, made application for costs, not including counsel fees, although, in its petition for intervention, and in its averments and petition for relief, it had asked for the allowance of counsel fees.

On October 27, 1948, the court denied with prejudice the right of all counsel, including counsel for Whitman, to counsel fees and expenses, but directed the clerk of the Court of Appeals to tax costs, partly in conformity with the rules of that court and partly in conformity with rules

applicable to the District Court. Those costs incurred in both cases were ordered by the court to be taxed, *four-fifths against your petitioner and one-fifth against the American Safety Table Company.*

Incredible as it may seem, all of these proceedings took place and the judgment and the orders were originally entered, not in a District Court or other court of original jurisdiction, but in the United States Court of Appeals for the Third Circuit, a court granted by the statutes, which created and maintain it, specifically and exclusively appellate jurisdiction.

Questions Presented.

1. Did the Court of Appeals err in that:

(a) it usurped the function of a court of original jurisdiction with respect to disputed questions of fact;

(b) as a court of exclusively appellate jurisdiction, it permitted the institution before it of what purported to be an original suit, received evidence and adjudicated disputed questions of fact therein and made original rulings of law with respect to the reception of evidence and its effect;

(c) it permitted the intervention of a stranger in a proceeding which was not, and did not thereby become, a case or controversy;

(d) it *sua sponte* required petitioner to show cause why it should not lose its property and property rights in an anomalous proceeding wherein there were no parties, pleadings or justiciable controversies;

(e) it "formulated" charges against your petitioner based in part at least upon a previous record heretofore condemned by this Court in 328 U. S. 575;

(f) it reached many untenable ultimate conclusions of fact, *e.g.*:

i. that Judge Davis' action in the *Root* case was improperly influenced by one Morgan S. Kaufman, one of petitioner's counsel;

ii. that Kaufman was employed by petitioner for the purpose of exercising and with the expectation that he would exercise an improper influence over Judge Davis in order to secure favorable judicial action in the *Root* case;

iii. that a loan by Kaufman to Davis' cousin, Stokley, adequately secured by Florida real estate, was the means by which Davis was compensated at least in part for his decision in the *Root* case favorable to your petitioner;

iv. that there was an illicit conspiracy between Davis and Kaufman to obstruct justice in existence as early as the date of the rendition of the judgments of affirmance in the *Root* case in 1935;

(g) it reached the conclusions described in (f) i, ii, iii and iv hereof in a fraud case upon evidence which was not clear, unequivocal or convincing;

(h) it misapplied the law, or failed to make rulings, upon the following propositions:

i. is evidence given by a witness before a grand jury or at a criminal trial and used unsuccessfully to

refresh his recollection, admissible as proof of the facts testified to before the grand jury or at the criminal trial or can it be used only for the purpose of impeaching the witness;

ii. is the doing of a favor by a lawyer for a judge and at the judge's request, where the lawyer is practicing before such judge, misconduct on the part of either or both;

iii. does the doing of such a favor, especially where it constitutes a legitimate business transaction, amount to such misconduct as to invalidate a judgment rendered by the judge in favor of the lawyer's client shortly before the doing of the favor;

iv. particularly, is this so where the agreement to do the favor and the favor itself took place after the decision of the court;

v. is there any impropriety in a general retainer of a lawyer, of any amount which the client is willing to pay, to preclude the lawyer from accepting other employment;

vi. is the practice of retaining an attorney who has the confidence of local courts so improper as to invalidate any judgment rendered by such courts in cases in which such an attorney represents a litigant;

vii. may a finding of fraud or bribery be made in the absence of clear, unequivocal and convincing evidence thereof;

viii. is not the burden of establishing such fraud or bribery by clear, unequivocal and convincing proof upon those who assert the same;

ix. may an inference of culpability be drawn unless it is the only fair and reasonable hypothesis inferable from the circumstances proved;

x. where two reasonable hypotheses are inferable from the circumstances proved, one of innocence and one of culpability, should not the court as a matter of law draw the inference of innocence;

xi. may the court draw any inference which is at variance with any direct credible testimony to the contrary;

xii. even if a continuing conspiracy exist between a judge and a lawyer to obstruct justice, may the lawyer's client, in the absence of clear, unequivocal and convincing proof that it knowingly hired the lawyer for the purpose of influencing the court or otherwise knowingly participated in such conspiracy, be charged with the stigma of fraud or wrongdoing;

xiii. was there before the Court of Appeals a case or controversy; if so, who was the plaintiff, what was the complaint, and what were the issues;

(i) it denied your petitioner a trial by jury;

(j) it directed that four-fifths of the costs incurred in another proceeding into which, for the convenience of the court, the record in the case at bar was stipulated, be taxed against your petitioner?

2. Did the Court of Appeals err in entering its judgment dated July 6, 1948?

3. Did the Court of Appeals err in entering those portions of the orders of June 20, 1947, of which review is hereby sought?

4. Did the Court of Appeals err in entering the order of April 6, 1948?

5. Did the Court of Appeals err in entering those portions of its order of October 27, 1948, of which review is hereby sought?

6. Did the proceeding here sought to be reviewed constitute a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States so as to permit the Court of Appeals to enter the judgment and orders here sought to be reviewed or take any action of any nature whatsoever therein binding upon petitioner or affecting its property rights or judgments?

7. Did the United States, *Amicus Curiae,* participating in this proceeding as a friend of the court, constitute a party adverse to petitioner within the meaning of Article III, Section 2, of the Constitution of the United States?

8. Did the intervenor, Whitman, constitute a party adverse to petitioner within the meaning of Article III, Section 2, of the Constitution of the United States?

9. Did the Court of Appeals have jurisdiction to enter in this proceeding the judgment of July 6, 1948, or the orders of June 20, 1947, April 6, 1948, or October 27, 1948, which are here sought to be reviewed, or take any action of any nature binding upon petitioner as a result, or as a part, or in pursuance, of an investigation in a cause which had been rendered moot by reason, *inter alia,* of the settlement thereof by the parties thereto, particularly since the

former and only actual adverse party in said cause failed and refused to appear or participate, but, on the contrary, signified to that court its desire that the finality of the settlement of the cause be undisturbed?

10. Do the judgment of July 6, 1948, or those portions of the orders of the Court of Appeals dated June 20, 1947, and April 6, 1948, and October 27, 1948, here sought to be reviewed, deprive your petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States?

11. Do the judgment or orders, or the portions thereof here sought to be reviewed, deviate from the mandate of this Court in the above-entitled causes issued under date of July 11, 1946?

12. Did the Court of Appeals err as a matter of constitutional, as well as statutory and common, law in granting the application of William Whitman Company, Inc. for leave to intervene?

Reasons Relied on for the Allowance of These Writs.

Exercise of the power of this Court to grant the writs of *certiorari* herein prayed for is sought upon the following grounds:

1. This Court, as a matter of equity and good conscience, should exercise its discretion to issue its writ of *certiorari* to review upon the facts and the law the action of the Court of Appeals in determining *in the first instance* a claim that the judgments of the Court of Appeals in *Root Refining Co.* v. *Universal Oil Products Co.*, 78 F. 2d 991, were invalid by reason of fraud or corruption because, in

the absence of exercise of such discretion, your petitioner will be denied any review of the jurisdiction and power of the Court of Appeals and of the findings of fact and conclusions of law made by a court which not only formulated the charges against your petitioner but heard the same as a trier of the facts.

2. The Court of Appeals, in assuming jurisdiction to enter its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed, did so in a matter which did not constitute a case or controversy, and in so doing acted in a manner which is untenable and probably in conflict with the decisions of this Court and of other Courts of Appeals.

3. The Court of Appeals, in assuming jurisdiction to enter its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed, did so in a matter in which there were no adverse parties, asserting adverse legally cognizable interests, and in so doing acted in a manner which is untenable and probably in conflict with the applicable decisions of this Court and of other Courts of Appeals.

4. The Court of Appeals, in assuming jurisdiction to enter its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed, did so in cases which had become entirely moot, for (a) these cases had been completely settled by agreement of the parties and (b) their subject matter had ceased to exist as one of the two patents involved had expired and the other had been held invalid by this Court, and in so doing acted in a manner which is untenable and probably in conflict with the

applicable decisions of this Court and of other Courts of Appeals.

5. The Court of Appeals, in making those portions of the orders sought to be reviewed, and in entering the judgment of July 6, 1948, deprived petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States, and in so doing acted in a manner which is probably in conflict with the applicable decisions of this Court and of other Courts of Appeals.

6. The question of whether the Court of Appeals had jurisdiction to enter its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed in these proceedings involves important questions of federal judicial administration which should be resolved by this Court.

7. The action of the Court of Appeals, in entering its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed, is believed to constitute a deviation by that court from the mandate of this Court, issued under date of July 11, 1946, and such deviation is untenable.

8. The action of the Court of Appeals, in making that portion of the order which granted leave to the intervenor-respondent to intervene, is, as a matter of constitutional, as well as statutory and common, law untenable and in conflict with the applicable decisions of other Courts of Appeals.

9. The findings of fact and conclusions of law made by the Court of Appeals, which furnished the basis for the entry of its judgment of July 6, 1948, were unwarranted

and untenable, as a matter of constitutional, as well as statutory and common, law.

WHEREFORE, your petitioner respectfully prays that writs of *certiorari* be issued out of and under the seal of this Court, directed to the Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all of the proceedings in the investigation conducted in the consolidated cause numbered and entitled in its Docket Nos. 5648 and 5546, Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee, since June 10, 1946 (the date of the last review of these proceedings by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575), and that the judgment and those portions of the orders of the Court of Appeals for the Third Circuit, of which review is hereby sought, may be reversed by this Court and that your petitioner have such other and further relief in the premises as to this Court may seem just; and your petitioner will ever pray.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

BY: RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

November 30, 1948.

IN THE

Supreme Court of the United States

October Term, 1948

No.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

Judgment and Orders Below

The final judgment of the Court of Appeals for the Third Circuit entered July 6, 1948, the final order of that court entered October 27, 1948, and the interlocutory orders of that court entered June 20, 1947, and April 6, 1948, respectively, are set forth in the certified transcript of the record filed with the Clerk of this Court and in the appendix annexed hereto.

The opinion of the Court of Appeals is set forth in 169 F. 2d 514.

Jurisdiction

The facts supporting the jurisdiction of this Court are set forth, or incorporated by reference, in the petition.

Cases believed to sustain the jurisdiction of this Court are as follows:

Universal Oil Co. v. *Root Rfg. Co.*, 328 U. S. 575;
Trade Comm'n v. *Goodyear Co.*, 304 U. S. 257;
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227;
Willing v. *Chicago Auditorium*, 277 U. S. 274;
U. S. v. *California Canneries*, 279 U. S. 553.

Statement of Facts

The facts are sufficiently set forth, or incorporated by reference, in the petition.

Specification of Errors

If the writs are granted, petitioner will urge that the Court of Appeals, in the instant proceeding, erred in the following respects:

1. In that:

(a) it usurped the function of a court of original jurisdiction with respect to disputed questions of fact;

(b) as a court of exclusively appellate jurisdiction, it permitted the institution before it of what purported to be an original suit, received evidence and adjudicated disputed questions of fact therein and made original

rulings of law with respect to the reception of evidence and its effect;

(c) it permitted the intervention of a stranger in a proceeding which was not, and did not thereby become, a case or controversy;

(d) it *sua sponte* required petitioner to show cause why it should not lose its property and property rights in an anomalous proceeding wherein there were no parties, pleadings or justiciable controversies;

(e) it "formulated" charges against your petitioner based in part at least upon a previous record heretofore condemned by this Court in 328 U. S. 575;

(f) it reached many untenable ultimate conclusions of fact, *e. g.*:

i. that Judge Davis' action in the *Root* case was improperly influenced by Kaufman;

ii. that Kaufman was employed by petitioner for the purpose of exercising and with the expectation that he would exercise an improper influence over Judge Davis in order to secure favorable judicial action in the *Root* case;

iii. that the loan by Kaufman to Davis' cousin, Stokley, was the means by which Davis was compensated at least in part for his decision in the *Root* case favorable to your petitioner;

iv. that there was an illicit conspiracy between Davis and Kaufman to obstruct justice in existence as early as the date of the rendition of the judgments of affirmance in the *Root* case in 1935;

(g) it reached the conclusions described in (f) i, ii, iii, and iv hereof in a fraud case upon evidence which was not clear, unequivocal or convincing;

(h) it misapplied the law, or failed to make rulings, upon the following propositions:

i. is evidence given by a witness before a grand jury or at a criminal trial and used unsuccessfully to refresh his recollection, admissible as proof of the facts testified to before the grand jury or at the criminal trial or can it be used only for the purpose of impeaching the witness;

ii. is the doing of a favor by a lawyer for a judge and at the judge's request, where the lawyer is practicing before such judge, misconduct on the part of either or both;

iii. does the doing of such a favor, especially where it constituted a legitimate business transaction, amount to such misconduct as to invalidate a judgment rendered by the judge in favor of the lawyer's client shortly before the doing of the favor;

iv. particularly, is this so where the agreement to do the favor and the favor itself took place after the decision of the court;

v. is there any impropriety in a general retainer of a lawyer, of any amount which the client is willing to pay, to preclude the lawyer from accepting other employment;

vi. is the practice of retaining an attorney who has the confidence of local courts so improper as to invalidate any judgment rendered by such courts

in cases in which such an attorney represents a litigant;

vii. may a finding of fraud or bribery be made in the absence of clear, unequivocal and convincing evidence thereof;

viii. is not the burden of establishing such fraud or bribery by clear, unequivocal and convincing proof upon those who assert the same;

ix. may an inference of culpability be drawn unless it is the only fair and reasonable hypothesis inferable from the circumstances proved;

x. where two reasonable hypotheses are inferable from the circumstances proved, one of innocence and one of culpability, should not the court as a matter of law draw the inference of innocence;

xi. may the court draw any inference which is at variance with any direct credible testimony to the contrary;

xii. even if a continuing conspiracy existed between a judge and a lawyer to obstruct justice, may the lawyer's client, in the absence of clear, unequivocal and convincing proof that it knowingly hired the lawyer for the purpose of influencing the court or otherwise knowingly participated in such conspiracy, be charged with the stigma of fraud or wrongdoing;

xiii. was there before the Court of Appeals a case or controversy; if so, who was the plaintiff, what was the complaint, and what were the issues?

(i) it denied your petitioner a trial by jury;

(j) it directed that four-fifths of the costs incurred in another proceeding into which, for the convenience of the court, the record in the case at bar was stipulated, be taxed against your petitioner.

2. In entering its judgment dated July 6, 1948.

3. In entering those portions of its orders dated June 20, 1947, of which review is hereby sought.

4. In entering its order of April 6, 1948.

5. In entering those portions of its order of October 27, 1948, of which review is hereby sought.

6. In assuming jurisdiction to make and enter herein its judgment dated July 6, 1948, and its orders of June 20, 1947, April 6, 1948, and October 27, 1948, respectively, in a matter which did not constitute a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States.

7. In assuming jurisdiction to make and enter herein its judgment dated July 6, 1948, and its orders of June 20, 1947, April 6, 1948, and October 27, 1948, respectively, although the causes in which the said judgments and orders were captioned had become entirely moot for (a) they had been completely settled by agreement of the parties thereto, making provision for the vacation of the judgments heretofore rendered therein and for a dismissal of the bills; and (b) their subject matter had ceased to exist as one of the

two patents involved had expired and the other had been held invalid by this Court.

8. In assuming that intervenor Whitman, even granting the propriety of the intervention, constituted an adverse party within the meaning of Article III, Section 2, of the Constitution of the United States.

9. In treating United States of America, *Amicus Curiae,* as the plaintiff in the proceeding, and hence a party within the meaning of the Constitution, although the court correctly held it not to be a "part of the case".

10. In making and entering the judgment and orders herein referred to in that the entry thereof deprived petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

11. In making and entering that portion of the order of April 6, 1948, which granted leave to the Whitman Company to intervene for the first time in an appellate court and to have the status, in effect, of a plaintiff in the proceeding although there was no case or controversy then pending before that court and Whitman did not present an issue of law or fact in common with any of those in the *Root* case.

12. In deviating from the mandate of this Court dated July 11, 1946.

Point I.

THE PETITION FOR WRITS OF *CERTIORARI* SHOULD BE GRANTED, AS A MATTER OF EQUITY AND GOOD CONSCIENCE, TO REVIEW ON THE MERITS THE FINDINGS, CONCLUSIONS AND JUDGMENT OF THE COURT OF APPEALS, SITTING AS A COURT OF FIRST INSTANCE AND ADJUDICATING DISPUTED QUESTIONS OF FACT.

We do not maintain that petitioner is entitled as a matter of right to a review on the merits of the findings, conclusions and judgment of the Court of Appeals. We concede that appeals and reviews are a matter of grace.

The situation here, however, is extraordinary. Purporting to adjudicate issues of fact and law as between "parties" who first appeared before it, the Court of Appeals has formulated issues as between those parties, all completely alien to any of the issues between the parties to the *Root* case, and has entered a final judgment affecting the property and rights of petitioner as between itself and strangers to the original litigation.

The issues adjudicated by the Court of Appeals did not arise in a justiciable case or controversy instituted in a court of original jurisdiction, were not tried before a judge of such a court, with or without a jury, and the determination of the lower court has not been reviewed. Unless this Court, as a matter of equity and good conscience, shall by the issuance of the writs prayed review the adjudication of the Court of Appeals, petitioner will be deprived of what many writers, both judicial and professorial, believe to be inherently just under American judicature.

For example, Dean Pound wrote in *Appellate Procedure in Civil Cases* (1941) (p. 3):

> "Ulpian tells us that appeals are needful because they correct the unfairness or unskilfulness of those

who adjudicate. But review does more than correct unfairness and mistakes. That determinations may be reviewed is a preventive of unfairness and a stimulus not to make mistakes. The possibility of review by an independent tribunal, especially by a bench of judges as distinguished from a single administrative official, is not the least of the checks which the law imposes upon its tribunals of first instance. That hasty, unfair or erroneous action may be reversed by a court of review holds back the impulsive, impels caution, constrains fairness and moves tribunals to keep to the best of their ability in the straight path."

In *Yates* v. *The People,* 6 Johns, *337, the Court for the Trial of Impeachments and the Correction of Errors of New York, speaking through Senator Clinton, observed (p. *364):

> "Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved."

In *Handy* v. *Butler,* 183 App. Div. 359, 169 N. Y. Supp. 770, the New York Appellate Division stated (p. 360):

> "The right of an appeal has been recognized uniformly by the Legislature as 'Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved.' (*Yates* v. *People,* 6 Johns. 364)."

The Court of Appeals for the District of Columbia stated (*Boykin* v. *Huff,* 121 F. 2d 865, 872):

> "The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily."

In *Stuart* v. *The People,* 4 Ill. (3 Scam.) 395, the Supreme Court of Illinois said (p. 403):

> "Perilous, indeed, would be the condition of the citizen, if he had not the privilege, in such a case, to have it reviewed by another tribunal, and defective would be our jurisprudence, if it afforded no means of relief."

Historically, the failure of a judicial system to allow one appeal to the losing party has almost invariably evoked a protest. Thus, the lack in many instances of an appeal from the Circuit Courts of the United States during the nineteenth century engendered criticism which is colorfully described by the authors of *The Business of the Supreme Court* (Frankfurter and Landis, 1927) as follows (p. 87-8):

> "The circuit courts exercised partly an appellate jurisdiction. Frequently, therefore, the district judge sitting in the circuit court would sit in sole judgment upon himself as judge of the district court. As we are told in an influential contemporary paper before the American Bar Association:
>
> " 'Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision.'

"We have suffered in this country from the folly of multiplicity of appeals, but the federal judicial system, at this time, too often erred in the opposite direction, for the decisions of the circuit court were final in all cases involving less than $5,000. Therefore, in cases arising in the district court appeals in numerous instances were empty form; in cases begun in the circuit court, unless the amount exceeded $5,000, there was no opportunity of appeal even to 'Philip intoxicated.' The hazards of litigation were amplified by the conscious reduction of the *ad damnum* below the appealable requirement. No wonder that extravagant language, descriptive of tyranny, was employed by responsible lawyers to characterize the powers wielded at this time by a single federal judge!"

Again, the same authors, in discussing the public reaction to the lack of an appeal from the Circuit Courts in criminal cases, said (*id.*, p. 109):

"For a full hundred years there was no right of appeal to the Supreme Court in criminal cases. Until 1889 even issues of life or death could reach that Court only upon a certificate of division of opinion. As the practice became more prevalent for a single judge to hold circuit court (until in the eighties it became the rule rather than the exception), the finality of power of the single judge became particularly open to criticism in criminal cases. The growing feeling of injustice finally ripened into the Act of February 6, 1889, by which, in all cases of conviction for a capital crime, final judgment against

the accused might be reviewed by the Supreme Court."

The federal judicial system as now constituted (Title 28 U. S. C. § 1252, 1253, 1291; Title 18 U. S. C. § 3731) recognizes one appeal as of right almost without exception.

We respectfully submit, therefore, that assuming that the Court of Appeals had the power (though we shall argue that it lacked the power) to entertain, in the first instance, proceedings between new parties with respect to new issues and to adjudicate therein disputed questions of fact, nevertheless this Court should, as a matter of inherent fairness to petitioner (always protesting its innocence and denying the validity of the findings of the Court of Appeals, based wholly upon inferences at least equally as consistent with innocence as with guilt) grant petitioner one review on the merits. If this Court shall not do so, then this anomalous proceeding, originating in a Court of Appeals, will stand without the protection of the "essential right of a litigator to have his cause examined in tribunals superior to the [redacted] in which he considers himself aggrieved."

Point II.

THE COURT OF APPEALS HAS NO POWER TO ADJUDICATE, AT LEAST IN THE FIRST INSTANCE, DISPUTED QUESTIONS OF FACT.

A brief resume of the facts will bring into bold relief the extraordinary character of the proceedings in the Court of Appeals.

The *Root* case was commenced in Delaware about 1930 by petitioner against Root Refining Company for infringe-

ment of certain patents. The causes were tried, judgments for petitioner entered, appeals taken to the Court of Appeals, judgments affirmed there, and rehearings denied. *Certiorari* was denied by this Court.

Thereafter, in 1939, petitioner and Root settled their controversy (328 U. S. 575).

In 1941, certain attorneys, who had previously represented Root but then represented other oil companies in litigation with petitioner, petitioned the Court of Appeals to investigate as to whether or not the judgments of affirmance in that court in the *Root* case in 1935 had been obtained through corruption of one of the judges. These attorneys, for want of a client before the court, filed their petition as *amici curiae*. Root, though invited, declined to be a voluntary party to those proceedings and was not sought to be brought in involuntarily by any legal process. Besides *amici curiae*, only petitioner was present in court and then only by informal invitation. The Court of Appeals appointed a master, who conducted hearings and filed a report advising that the judgments were tainted with fraud. The Court of Appeals affirmed the master's findings and ordered the judgments of affirmance set aside and a reargument of the causes.

Thereafter, this Court reversed an order awarding compensation and expenses in the investigation to *amici curiae* on the ground that the order setting aside the judgments of affirmance, upon whose validity the validity of the order granting compensation and expenses depended, was entered in a proceeding where the safeguards of adversary litigation had not been observed (328 U. S. 575).

Upon consideration of the decision of this Court, the Court of Appeals vacated its order setting aside the judgments of affirmance in the *Root* case, but directed that peti-

tioner show cause why such judgments should not be set aside for fraud. The court also authorized the Attorney General or a representative to appear *Amicus Curiae*. Three representatives of the Department of Justice did appear for the United States of America, *Amicus Curiae*. Thereupon, with leave of the Court of Appeals, the attorneys (*"amici curiae"* in the opinion of this Court in 328 U. S. 575) who had instituted the original investigation in 1941, withdrew.

At about the same time, Skelly Oil Company, which for many years had been engaged with petitioner's predecessor in patent infringement litigation involving a patent wholly dissociated from the patents involved in the *Root* case, asked leave to intervene in further proceedings in the investigation before the Court of Appeals or the District Court. This petition was granted. Thereafter in the spring of 1948, Skelly paid a large sum of money to petitioner's predecessor in settlement of the litigation between them and, by leave of the Court of Appeals, withdrew from the proceedings.

In the meantime, William Whitman Company, Inc., then the plaintiff in litigation with petitioner in Delaware, petitioned the Court of Appeals for leave to intervene for the purpose of attempting to prove, and obtaining the benefit of an adjudication, that petitioner had corrupted the Court of Appeals in connection with the judgments of affirmance in the *Root* case.

On January 16, 1948, the Chief Justice of the United States appointed Honorable Morris A. Soper, Circuit Judge, Honorable John C. Mahoney, Circuit Judge, and Honorable E. Barrett Prettyman, Associate Justice, to sit as the Court of Appeals for the Third Circuit in connection with further proceedings in this matter and one other matter. After preliminary conferences, at which jurisdic-

tional and other legal objections were presented to the Court of Appeals, as so constituted, the court passed its order dated April 6, 1948, in which it (a) formally approved of Skelly's withdrawal;* (b) formally permitted William Whitman Company, Inc. to intervene; (c) "formulated" the charges against petitioner; and (d) directed the representatives of the Department of Justice to present the evidence in the matter.

After overruling the objections of petitioner to jurisdiction and procedure, the court proceeded in May 1948 with the hearings on the merits and on July 6, 1948, entered the final judgment, for a review of which this application is filed. The judgment, *inter alia,* set aside for fraud the 1935 judgments of affirmance in the *Root* case. The facts were bitterly contested and disputed. Petitioner, through the mouths of living and dead witnesses, denied any wrongdoing, both generally and specifically. There was no direct or circumstantial evidence, we submit, sustaining the charge of fraud and corruption. The decision of the Court of Appeals is based entirely upon hypotheses and inferences, drawn from circumstances *at least* equally as consistent with innocence as with guilt.

There was before the court none of the issues involved in the original litigation between petitioner and Root in the *Root* case; the issue in the *Root* litigation was whether or not Root had infringed petitioner's patents, whereas the issue before the Court of Appeals was whether or not petitioner had bribed Judge Davis in connection with the affirmance of the judgments in the *Root* case.

Of the two original parties to the *Root* case, Root declined, as we have seen, to come into court and, indeed,

*Although Skelly had actually withdrawn on March 23, 1948, by leave of the court.

specifically disclaimed any interest whatever in the proceeding. Only your petitioner remained of the original parties to the *Root* case.

At the commencement of the hearings in May 1948 there were before the court, besides petitioner:

(a) the United States of America, *Amicus Curiae,* denominated by the Court of Appeals as "not a part of the case"; and

(b) William Whitman Company, Inc., intervenor by order of the Court of Appeals which said of Whitman that it had come in "to reap the benefit of the disclosures" and "in order to advance the suit for a return of royalties which it had brought against" petitioner.

Thus, we find a brand-new proceeding,* of some variety not known to the law, instituted originally in the Court of Appeals between William Whitman Company, Inc. and petitioner (for, as the court pointed out, the United States, *Amicus Curiae,* was not a "part of the case"), having to do with brand-new issues first raised in the Court of Appeals. The facts were sharply in controversy; no fact essential to the finding of fraud was undisputed.

The hearing of the evidence took place in the presence of the Court of Appeals; it was never submitted to any inferior tribunal, not even to a master. The questions of fact were all determined in the *first instance* by the Court of Appeals.

Under the foregoing circumstances, we respectfully submit that the Court of Appeals was without judicial power to conduct the hearings and reach conclusions of fact in the first instance.

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*For a more detailed description of all the proceedings, see the petition (pp. 3-16, *supra*).

Although the Court of Appeals is one of the inferior federal courts authorized by the Constitution, that document vests in Congress the right to establish the court and fix its jurisdiction (Constitution, Article III, Section 1), subject, of course, to the limitation of Section 2 of the same article.

Congress has vested the Court of Appeals exclusively with appellate jurisdiction (Title 28 U. S. C. § 1291-93).*

In accordance with the limitations of the statute, it is uniformly held that the Court of Appeals may not exercise original jurisdiction, but is limited to *the appellate jurisdiction granted by Congress. Whitney* v. *Dick,* 202 U. S. 132; *United States* v. *Mayer,* 235 U. S. 55; *Realty Co.* v. *Montgomery,* 284 U. S. 547; *Roche* v. *Evaporated Milk Assn,* 319 U. S. 21; *United States* v. *Moy Yee Tai et al.,* 2 Cir., 109 Fed. 1, *app. dism'd* 187 U. S. 652; *Zell* v. *Judges of Circuit Court,* 4 Cir., 149 Fed. 86, *aff'd* 203 U. S. 577; *Minnesota & Ontario Paper Co.* v. *Molyneaux,* 8 Cir., 70 F. 2d 545; *Hall* v. *United States,* 10 Cir., 78 F. 2d 168; *Stephenson* v. *Equitable Life Assur. Soc.,* 4 Cir., 92 F. 2d 406; *In re Philadelphia & Reading Coal & Iron Co.,* 3 Cir., 103 F. 2d 901; *Alderman* v. *Elgin, J. & E. Ry. Co.,* 7 Cir., 125 F. 2d 971; *Mutual Life Ins. Co. of New York* v. *Holly,* 7 Cir., 135 F. 2d 675; *United States* v. *Rabb,* 3 Cir., 147 F. 2d 225, *cert. den.* 324 U. S. 870; *Semel* v. *United States,* 5 Cir., 158 F. 2d 229.

In *Whitney* v. *Dick,* 202 U. S. 132, this Court stated (p. 137):

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*As this Court has so aptly said in *Scott* v. *McNeal,* 154 U. S. 34, 46:

> " 'To give such proceedings [as a matter of due process] any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; * * *.' "

> "It will be borne in mind that the Circuit Court of Appeals, which is a court created by statute, *Kentucky* v. *Powers,* 201 U. S. 1, 24, is not in terms endowed with any original jurisdiction. It is only a court of appeal. Section 2 of the act says that it 'shall be a court of record with appellate jurisdiction, as is hereafter limited and established.' Section 6 provides that it 'shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases,' etc. By section 10 'whenever on appeal or writ of error or otherwise a case coming from a Circuit Court of Appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper District or Circuit Court for further proceedings in pursuance of such determination.' Sections 4, 13 and 15 name the courts whose judgments may be reviewed in the Courts of Appeals. Obviously the Courts of Appeals are simply given appellate jurisdiction over certain specified courts. It follows that they are not authorized to issue original and independent writs of *habeas corpus.*"

The authorities are uniform that Courts of Appeals may not receive disputed evidence *dehors* the record. Undisputed evidence has been received in cases involving abatement or loss or lack of jurisdiction and in *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U. S. 238, this Court held (p. 240) that, where undisputed facts were before the Court of Appeals, it might decide questions of law upon that record. In the *Hazel-Atlas* case, however, this Court expressly declined to decide whether "if the facts relating to the fraud were

in dispute and difficult of ascertainment, the Circuit Court here should have held hearings and decided the case" (*id.*, fn. 5, p. 249-50).

In *Price* v. *Johnston,* 334 U. S. 266, this Court said (p. 291):

> "Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed."

In *Roemer* v. *Simon et al.,* 91 U. S. 149, this Court said (p. 150):

> "No new evidence can be received here."

In *Russell* v. *Southard et al.,* 12 How. 139, Chief Justice Taney said (p. 159):

> "This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting, as an appellate tribunal."

A fortiori, the same rule applies to the Court of Appeals also an appellate court. In *Realty Co.* v. *Montgomery,* 284 U. S. 547, this Court held that appellate courts may only affirm, reverse or modify a judgment on the basis of error in the certified record. This Court applied to the Court of Appeals the rule that this Court "could not receive new evidence".

This Court has distinguished between the consideration of undisputed evidence by an appellate tribunal and its reception of and adjudication upon disputed testimony. In the former case the appellate court may act; in the latter

it may not. *Dakota County* v. *Glidden*, 113 U. S. 222, 226-7, explaining *Bd. of Liquidation* v. *L. & N. R. R. Co.*, 109 U. S. 221. That distinction has never been overruled by this Court.

We therefore respectfully urge:

(a) that the Court of Appeals, as an appellate tribunal, is without jurisdiction to entertain a new lawsuit between new parties upon novel issues not theretofore submitted to or tried by a court of original jurisdiction; and

(b) that, even if it be assumed that the Court of Appeals had power to entertain such a proceeding, it cannot receive testimony on disputed questions of fact and adjudicate them.

Point III.

THERE WAS BEFORE THE COURT OF APPEALS NO CASE OR CONTROVERSY AS REQUIRED BY THE CONSTITUTION.

A. The Jurisdiction of Federal Courts is Limited by the Constitution to Cases or Controversies.

Although all inferior federal courts are statutory courts in that they are created by an Act of Congress pursuant to Article III, Section 1, of the Constitution, they are nevertheless constitutional courts, and their jurisdiction is limited by Article III, Section 2, of the Constitution. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227; *Ex Parte Bakelite Corp'n*, 279 U. S. 438; *Muskrat* v. *United States*, 219 U. S. 346.

The pronouncements of this Court leave no doubt that all federal courts are limited in their jurisdiction to "cases" and "controversies". *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *Osborn* v. *U. S. Bank,* 9 Wheat. 738; *In re Pacific Ry. Com'n,* N. D. Cal., 32 Fed. 241.

Thus in *Liberty Warehouse Co.* v. *Grannis, supra,* this Court referred to the jurisdictional limitation imposed by Section 2 on the federal courts as follows (p. 74):

> "It suffices to say that in the light of the decisions in *Muskrat* v. *United States,* 219 U. S. 346, 357; *Fairchild* v. *Hughes,* 258 U. S. 126, 129; *Texas* v. *Interstate Commerce Comm.,* 258 U. S. 158, 162; *Keller* v. *Potomac Elec. Co.,* 261 U. S. 428, 444; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488; *New Jersey* v. *Sargent,* 269 U. S. 328, 330; and *Postum Cereal Co.* v. *California Fig-Nut Co.,* 272 U. S. 693, in which the principles stated in earlier cases are considered and applied—*it is not open to question that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights,** or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable

*Italics supplied unless otherwise indicated.

> of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case."

In *Osborn* v. *U. S. Bank,* 9 Wheat. 738, this Court, speaking through Chief Justice Marshall, referred to the same limitation, saying (p. 819):

> "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. *That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.* It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States."

A judgment rendered in a proceeding which is not a case or controversy within the meaning of the many decisions of this Court is a complete nullity and void. *Lord* v. *Veazie,* 8 How. 251, 256; *O'Donnell* v. *United States,* 9 Cir., 91 F. 2d 14.

This Court has repeatedly defined the words "cases" and "controversies".

B. There Can Be No Case or Controversy Without an Actual Controversy.

Since the existence of a controversy is a basic prerequisite of federal jurisdiction, it follows that, whenever by settlement of the parties or otherwise the existing controversy has come to an end, the case becomes moot and a federal court is rendered powerless thereafter to act in the matter. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113; *Walling* v. *Shenandoah-Dives Mining Co.*, 10 Cir., 134 F. 2d 395; *St. Pierre* v. *United States*, 319 U. S. 41; *Alejandrino* v. *Quezon*, 271 U. S. 528; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Buck's Stove &c. Co.* v. *Am. Fed. of Labor*, 219 U. S. 581; *American Book Co.* v. *Kansas*, 193 U. S. 49; *Mills* v. *Green*, 159 U. S. 651; *Dakota County* v. *Glidden*, 113 U. S. 222; *Paradise Land & Livestock Co.* v. *Federal Land Bank, Etc.*, 10 Cir., 147 F. 2d 594, *cert. den.* 326 U. S. 717.

In *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, the doctrine was stated as follows (p. 116):

> "* * * it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. *Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly.* However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules or law which can-

> not affect the result as to the thing in issue in the case before it. *No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' California* v. *San Pablo & Tulare R. R. Co.,* 149 U. S. 308, 314; *United States* v. *Hamburg-American Line,* 239 U. S. 466, 475, 476, and previous cases of this court therein cited."

Similarly, in *Walling* v. *Shenandoah-Dives Mining Co.,* 10 Cir., 134 F. 2d 395, the Court of Appeals held that it had no jurisdiction of a cause that had become moot, saying (p. 396-7):

> "Under Article 3, Section 2 of the Constitution, the United States federal courts have jurisdiction to hear and determine 'cases and controversies.' A moot question does not present a case or controversy within the meaning of the Constitution. *When in the course of a trial the matter in controversy comes to an end, either by an act of one or both of the parties or by operation of law, the question becomes moot and the court is without further jurisdiction in the matter."*

Judged by these principles, the instant proceeding, we respectfully submit, was not in 1941, and has not since that time been, a case or controversy under the Constitution and, consequently, the Court of Appeals was without power to take any juridical action therein affecting the property of petitioner.

Although the judgment and orders of the Court of Appeals in the instant proceeding are captioned as if they

occurred in the *Root* case, no controversy has existed between Root and petitioner, the only parties to the *Root* case, since 1939 (328 U. S. 575, 577). At that time Root settled its controversy with petitioner in that case and thereafter declined to make itself a party, or to be made a party to further proceedings, concededly preferring its settlement to reopening the case and rearguing the appeal (*ibid.*). In 1944 petitioner and Root entered into a further general settlement in which, among other things, it was prcvided that either party might vacate the judgments of the District Court in the *Root* case and dismiss the complaints. Never to this date has Root appeared or asserted any further interest in the *Root* case nor has any process issued addressed to it.

On these facts, all of which were before this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575, it was held, we believe, that there was no longer any controversy in the *Root* case. Thus this Court said (p. 577-8):

> "They [*amici curiae*] urged an investigation of the questionable features surrounding affirmance of the *Root* decree, but *expressed doubt as to the capacity* in which they could formally make such a request of the Court. Their difficulty was due to the fact that after this Court had denied *certiorari* in the *Root* case, *Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the law suit.* The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case. And so their attorneys, who were the attorneys in the *Root* litigation and the moving attorneys in the present proceedings, could not move

> on their behalf to have the *Root* decree vacated. But these other oil companies had an interest in the *Root* decree since it might be used in pending cases to their disadvantage. Universal offered to consent to a reargument of the *Root* case and to preserve to the Root Company the benefits of the existing agreement, even if Universal should prevail upon reargument. Throughout these proceedings Universal stood ready to carry out this offer, but nothing ever came of it, presumably because Root was not represented at these hearings and the other oil companies were not parties of record in the original litigation."

Of the two patents involved in the *Root* case, one was held invalid by this Court and the other was held not infringed (*Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471) and, in any event, the latter patent expired in 1938.

Under these circumstances, we submit that, as between petitioner and Root, the *Root* case was wholly moot prior to the commencement of these proceedings and, hence, there was no longer any existing controversy between them of which any federal court had jurisdiction.

This fundamental defect was not cured by the intervention of the Whitman Company, the very *raison d'etre* of whose intervention depended upon the pendency of a preexisting justiciable case or controversy.* *Kendrick* v.

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*The intervention of Whitman, it will be recalled, was claimed to be in aid of a suit which it already had pending against petitioner in Delaware. In that suit Whitman charged fraud and misrepresentation on the part of petitioner in 1938 or thereabout with respect to the judgments of affirmance in the *Root* case. The court below pointed out that most of the evidence had been produced in the first investigation and that Whitman had "come in to reap the benefits of the disclosures, * * * in order

Kendrick, 5 Cir., 16 F. 2d 744, *cert. den.* 273 U. S. 758; *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.*, D. N. J., 46 F. Supp. 346; *Haase* v. *Haase*, 261 Ill. 30, 103 N. E. 628.

In *Kendrick* v. *Kendrick, supra*, the court, in holding that a petition for intervention could not be granted by a court which lacked jurisdiction, said (p. 745):

> "An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit or action by which a third person is permitted to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adversely to both of them. * * * As the record does not show that at the time the petition to intervene was presented there was pending any suit or proceeding within the court's jurisdiction, that petition was not allowable."

Similarly, in *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.*, D. N. J., 46 F. Supp. 346, the court stated the proposition as follows (p. 347):

> "Intervention presupposes the pendency of a suit in a court of competent jurisdiction, and one who voluntarily becomes a party thereto, impliedly, if not expressly, accepts the proceedings as he finds them at the time of the intervention * * *."

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to advance its suit for a return of royalties which it has paid" petitioner.

The allegations of Whitman against petitioner are later shown not to constitute "a real and substantial controversy admitting of specific relief through a decree of a conclusive character" (p. 57, *infra*).

C. There Can Be No Case or Controversy Without Adverse Parties Asserting Adverse Interests.

This Court has consistently held that an absolute *sine qua non* of a constitutional case or controversy is the *initial* and *continued* presence of adverse parties asserting adverse interests. *Muskrat* v. *United States,* 219 U. S. 346; *Lord* v. *Veazie,* 8 How. 251; *O'Donnell* v. *United States,* 9 Cir., 91 F. 2d 14.

In *Lord* v. *Veazie,* 8 How. 251, this Court said (p. 255):

> "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves,—and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.
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> * * * * * * *
>
> *"But there must be an actual controversy, and adverse interests.* The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. *The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same*

> *interest,* and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be."

In *O'Donnell* v. *United States,* 9 Cir., 91 F. 2d 14, 20, the Court of Appeals held that a judgment obtained in a prior proceeding was invalid and not binding upon the instant appellants because it had been rendered in a non-adversary action "in which the claimant and defendant were one, and hence no justiciable issue existed upon which adjudication could be had."

The Court will not be bound by the title of the cause which may, on its face, indicate the presence of adverse parties, but will inquire into the nature of the action to determine whether there are adverse parties asserting adverse interests. In *Muskrat* v. *United States,* 219 U. S. 346, this Court, in holding that there were no adverse parties even though there purported to be, said (p. 361):

> "It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part."

Even though a controversy between adverse parties may exist at the time a case is commenced, if at any stage in the litigation the adversary character of the parties ceases, the court loses jurisdiction and the court's power thereafter to act in the case also ceases. *South Spring Gold Co.* v. *Ama-*

dor Gold Co., 145 U. S. 300; *Cleveland* v. *Chamberlain*, 1 Black 419.

In the *Chamberlain* case, *supra*, this Court held that there was no justiciable controversy before it because the defendant had become the sole party in interest on both sides. Thus this Court said (p. 426):

> "It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee. It differs from the case just cited in this alone, that *there* both parties colluded to get up an agreed case for the opinion of this court; *here*, Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interest of persons not parties to the pretended controversy."

In *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, it was held that a constitutional controversy no longer existed in the action since both the defendant and plaintiff corporations had come into the same hands. In so ruling, the Court stated "the litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one" (p. 301).

Were there any adverse parties in the *Root* case in 1941 or thereafter? Certainly Root did not qualify as such. As we have shown, not only had Root settled its controversy with petitioner, but it refused in 1941 and thereafter to be represented at the proposed investigation.

In the absence of any controversy between Root and petitioner, between what adverse parties could a controversy be said to have existed in the *Root* case after 1939?

Amici curiae, who originally suggested the investigation in 1941, as such had no controversy with petitioner in the *Root* case. As individuals, they asserted no claims against petitioner. This Court specifically found that they were compelled to adopt the role of *amici* because they did not represent any parties to the *Root* case and remained only *amici* throughout (*Universal Oil Co.* v. *Root Rfg. Co.,* 328 U. S. 575, 578). In any event, as we have previously shown, original *amici curiae* withdrew by permission of court on July 30, 1947.

The United States of America, *Amicus Curiae,* stands in no position different from that of original *amici curiae* herein or from that of counsel for the O. P. A. in *Brown* v. *Wright,* 4 Cir., 137 F. 2d 484. The court there said (p. 487):

> "* * * the appearance of counsel would have been an appearance amicus curiae and not an appearance in behalf of a party."

The Court of Appeals here has recognized such to be the status of United States of America, *Amicus Curiae,* for it has specifically held it was "not a part of the case".

Neither Skelly Oil Company, whose intervention was permitted in June 1947, and which withdrew from the proceedings, with leave of court, on March 23, 1948, nor the Whitman Company, whose intervention was permitted on April 6, 1948, was a "party" asserting the necessary adversary interests prescribed by the decisions of this Court (pp. 38, 50-1, *supra;* pp. 61-2, *infra*).

The Court of Appeals recognized the anomalous character of the proceeding which it "visualized * * * as a proceeding by the Court, or at the instance of the Court and for

the purpose of purging the record, if that be needed." Like the Master in the prior proceeding condemned by this Court in 328 U. S. 575, the Court of Appeals considered the present proceeding as one "undertaken and prosecuted as an *investigation* by the court itself into the integrity of its own judgment; and it [the Court of Appeals] would have proceeded to a final conclusion with or without the assistance or intervention of private parties."

D. There Can Be No Case or Controversy Unless a Legally Protected Interest is Asserted.

It is axiomatic that one invoking the aid of a court must state a cause of action cognizable in the forum appealed to. A cause of action is frequently referred to as the enforcement of a "legally protected" right or interest. Such a right or interest must spring from the common law or be created by statute. In the federal courts, at least, the assertion of a claim which does not fall within the foregoing description does not constitute a "case" or "controversy" under the Constitution. *Oklahoma* v. *Civil Service Comm'n,* 330 U. S. 127;* *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113; *New Jersey* v. *Sargent,* 269 U. S. 328; *Associated Industries* v. *Ickes,* 2 Cir., 134 F. 2d 694; *Stark* v. *Wickard,* C. A. D. C., 136 F. 2d 786.

As we have seen, the United States, *Amicus Curiae,* was not a party (pp. 40, 55, *supra*) and therefore asserted no juridically recognized adverse claim against petitioner.

Did the Whitman Company, by its intervention, assert such a claim? We think not.

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*It must be a legal right, *i.e.,* one of property, one arising out of contract, one protected against tortious invasion, or one founded upon a statute which confers an enforceable privilege.

Whitman, in support of its motion for leave to intervene, stated that it "is not complicating these proceedings by asking for individualized relief, neither judgment for money nor for equitable relief". That candid statement, which is readily supported by the nature of the intervention sought, disclosed the basic defect which is fatal to its assertion in the Court of Appeals of an adverse claim against petitioner.

Whitman did not here ask "specific relief through a decree of a conclusive character" (*Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 241) as redress for the invasion of a legally protected interest. In admitting this, it conceded that it sought in the Court of Appeals merely a determination *in vacuo* of one of the issues in its action against petitioner pending in the District Court in Delaware, *viz.*, a finding that the *Root* judgments were fraudulently obtained. But such a determination was not the ultimate relief sought or, as this Court has put it, "an immediate and definitive determination of the legal rights of the parties" (*ibid.*) with respect to the relief which it ultimately seeks against petitioner in the Delaware action. There it prays for a rescission and restitution or, in the alternative, a reformation of its license agreement with petitioner. On neither theory did the setting aside of the *Root* judgments become determinative, for Whitman will still be obliged to continue its litigation in Delaware to a successful conclusion on the other issues.

In effect, Whitman therefore sought to be permitted to participate in the hearings solely for the purpose of obtaining an advisory opinion by the Court of Appeals. Such a determination may not be rendered in a federal court. *Coffman* v. *Breeze Corporations,* 323 U. S. 316; *Willing* v.

Chicago Auditorium, 277 U. S. 274. As the court below pointed out, Whitman had "come in * * * in order to advance its suit for a return of royalties which it has paid" petitioner. In other words, Whitman, as it frankly conceded, did not ask for individualized relief in these proceedings. That is precisely what this Court condemned in *Coffman* v. *Breeze Corporations, supra.*

In that case plaintiff, a patent owner, brought an action to enjoin his licensees from paying accrued royalties to the Government under the Royalty Adjustment Act, and to have that Act declared unconstitutional. The defendant refused to contest the validity of the Act and alleged that, whether the Act was valid or invalid, it did not owe any royalties to plaintiff. Plaintiff asked for "no judgment for the recovery of the royalties alleged to be due" from the defendant.

Plaintiff had also brought an action in another jurisdiction to recover royalties under its license contracts from defendant. That cause was at issue and the court there had preliminarily ruled that the plaintiff might recover all royalties which had accrued or might accrue to the date of trial.

In holding that the proceeding before it did not constitute a justiciable case or controversy, since plaintiff was only seeking an advisory opinion of the validity of a defense to its suit for royalties, this Court said (p. 323-4):

> "So far as the present suit seeks a declaratory judgment or an injunction restraining payment of the royalties into the Treasury, it raises no justiciable issue. Appellant asserts in the present suit no right to recover the royalties. It asks only a determination that the Royalty Adjustment Act is unconstitutional and, if so found, that compliance with the Act

be enjoined, an issue which appellee by its answer declines to contest. If contested the validity of the Act would be an issue which, so far as it could ever become material, would properly arise only in a suit to recover the royalties, where it could be appropriately decided.

"In the circumstances disclosed by the record and for purposes of the present suit, the constitutionality of the Act is without legal significance and can involve no justiciable question unless and until appellant seeks recovery of the royalties, and then only if appellee relies on the Act as a defense. *The prayer of the bill of complaint that the Act be declared unconstitutional is thus but a request for an advisory opinion as to the validity of a defense to a suit for recovery of the royalties.* Appellee could have made such a defense but does not appear to have done so in the pending accounting suit and does not assert its validity here. The bill of complaint thus fails to disclose any ground for the determination of any question of law or fact which could be the basis of a judgment adjudicating the rights of the parties."

We submit that the determination by the Court of Appeals in this proceeding of the issue of fraud as between Whitman and petitioner was merely a forbidden advisory opinion upon an abstract question not resolving "a real and substantial controversy admitting of specific relief". *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 241. Hence the intervention of the Whitman Company added nothing to the jurisdiction of the Court of Appeals.

E. The Court of Appeals Was Not Powerless to Have Acted Effectively in Other Ways.

Although, we respectfully submit, the foregoing arguments demonstrate that there were before the Court of Appeals no case, no controversy, no pleadings, no parties, no adverse interests and no assertion of a legally protected interest, nevertheless this does not mean that the Court of Appeals lacked the power "to unearth * * * a fraud" perpetrated against it and "to unearth it effectively" (328 U. S. 575, 580).

The lower court might have acted effectively in a variety of ways. For example, it might (1) have spread upon its record the testimony taken at the investigation and the report, thus bringing the opprobrium of publicity and the righteous indignation of the court into focus upon the malefactors, if any; (2) have commenced disciplinary proceedings against officers of the court; (3) have suggested or caused the commencement of contempt of court proceedings; and (4) have made available to public prosecutor and private litigant alike the testimony and the report.

The foregoing, we respectfully suggest, would have constituted an effectual unearthing of fraud against the court and should have fully satisfied the strictest requirements of a court properly jealous of its honor.

We have protested that, in the proceeding heretofore described and by the means adopted by the Court of Appeals, petitioner has been unjustly and unwarrantably brought to task and deprived of its property in violation of due process of law and of other established Constitutional principles.

Point IV.

THE COURT OF APPEALS, IN GRANTING LEAVE TO WILLIAM WHITMAN COMPANY, INC. TO INTERVENE, ACTED WITHOUT JURISDICTION AND IN A MANNER CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEAL.

1. Since the existence of a case or controversy was a prerequisite to Whitman's intervention, the Court of Appeals had no jurisdiction to make and enter the orders granting leave to intervene. *Kendrick* v. *Kendrick,* 5 Cir., 16 F. 2d 744, 745, *cert. den.* 273 U. S. 758; *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.,* D. N. J., 46 F. Supp. 346, 347; *Haase* v. *Haase,* 261 Ill. 30, 32, 103 N. E. 628.

In granting Whitman leave to intervene, however, it would seem that the lower court sought to cure this fundamental jurisdictional defect by permitting Whitman to "lift itself by its own bootstraps", *i.e.,* it in effect attempted to create a case or controversy by the intervention itself. The obvious defect in such reasoning is, of course, that any interest which Whitman had was not in any preexisting case or controversy but in the case or controversy which the court purported to create by allowing the intervention.

If Whitman may only intervene in an existing case or controversy, how can its intervention create such a case or controversy?

In any event, as we have seen (p. 57, *supra*), Whitman did not assert, in this proceeding, a legally protected interest and did not seek "a decree of a conclusive character" both of which are prerequisite to the existence of a case or controversy in the constitutional sense.

2. Moreover, the order granting leave to intervene is contrary to the rule, obtaining in many other Courts of Appeals, that intervention will not be permitted for the first time in an appellate court. *Wenborne-Karpen Dryer Co.* v. *Cutler Dry Kiln Co.*, 2 Cir., 292 Fed. 861; *Veitia* v. *Fortuna Estates*, 1 Cir., 240 Fed. 256; *Morin* v. *City of Stuart*, 5 Cir., 112 F. 2d 585. See *Smith* v. *American Asiatic Underwriters*, 9 Cir., 134 F. 2d 233, 236. *Cf. United States* v. *Patterson*, 15 How. 10.

3. Even if there were a case or controversy here involved, the intervention permitted below at this late date is contrary to the weight of authority. Whitman knew of the investigation as early as June 1941 and original *amici curiae* had been its counsel, but it did not seek to intervene until December 30, 1947. *Roberts* v. *Metropolitan Life Ins. Co.*, 7 Cir., 94 F. 2d 277, 281; *American Brake Shoe & F. Co.* v. *Interborough R. Tr. Co.*, 2 Cir., 112 F. 2d 669; *Baltimore Trust Co.* v. *Interocean Oil Co.*, D. Md., 30 F. Supp. 484, 485; *The American Eagle*, D. Del., 28 F. 2d 1000, 1001.

Point V.

THE COURT OF APPEALS LACKED JURISDICTION TO DIRECT THE DISTRICT COURT TO VACATE THE JUDGMENTS AND DISMISS THE COMPLAINTS IN THE *ROOT* CASE.

In the *Root* case judgment went for plaintiff in the District Court. That judgment has never been criticized or impeached in any wise whatsoever.

When Root, the losing party, appealed to the Court of Appeals it, not petitioner, sought relief. The alleged fraud

occurred, not in connection with an effort to reverse the District Court, but in connection with retaining judgments honestly granted there.

Had petitioner been the losing party in the District Court and had it, through fraud and corruption, obtained a reversal in its favor in the Court of Appeals, then, upon vacating the judgments of reversal, the Court of Appeals would have left undisturbed the action of the District Court in dismissing the original complaints. By a parity of reasoning, when the Court of Appeals vacated the judgments of affirmance, it had power only to direct a reargument by the parties to the *Root* suit, in default of which the honestly rendered judgments of the District Court would stand.

Point VI.

THE ACTION TAKEN BY THE COURT OF APPEALS VIOLATES THE CONCEPTS OF DUE PROCESS OF LAW.

Over and above the other questions raised in this brief, including those affecting the jurisdiction of the Court of Appeals, we respectfully submit that the entry of the judgment by that court on July 6, 1948 and the taking of all the proceedings leading up to the judgment have resulted in depriving petitioner of its property without due process of law within the meaning of the Fifth Amendment.

Due process, it seems to us, entitles a person, before being deprived of his liberty or his property, to be apprised and brought into a court of competent jurisdiction in the ordinary way by ordinary process; to have the case proceed in the usual way prescribed by the Federal Rules of Civil Procedure; to be notified of the nature of charges or claims against him by ordinary pleadings and to have the oppor-

tunity to make motions addressed thereto as permitted by the rules; in due course to have the case come on before a judge authorized to sit on the case in the usual course of litigation; to have the cause tried before him, with or without a jury as plaintiff's rights and preferences demand; and to have judgment entered and costs taxed in a manner consistent with the usual and ordinary practice; and, if he be the losing party in such a case, to have an appeal as a matter of right to the Court of Appeals and, losing upon that appeal, the opportunity granted in the usual way of applying to this Court for a further review by writ.

Now, in the proceeding before the Court of Appeals here, none of these things happened.

The proceeding was commenced in the Court of Appeals by its own order to show cause, thereby immediately depriving petitioner of one review as a matter of right.

No facilities were provided for the trial of the issues here involved by a jury, to which petitioner was entitled as a matter of law.

No pleadings in the usual sense were filed, as is evidenced by the nondescript titles given to documents which purported to be substituted for pleadings. For example, there were no "complaints" filed; instead a series of documents called "An Order to Show Cause", a "Statement of Ultimate Facts", and "Averments". There were no answers; instead petitioner with respect to some of the documents presented filed a "Response" and with respect to others was deemed by the court to have entered a general denial without the filing of any paper.

It seems to us not to be an answer to the foregoing objections that, at least in some aspects of the matter, petitioner was afforded improvised and rough and ready sub-

stitutes for the usual and regular procedure of the courts.

We believe that petitioner was entitled, as a matter of due process, to have all of the same facilities and machinery of the courts function with respect to charges against it, as are usually afforded other litigants.

This Court said in *Scott* v. *McNeal,* 154 U. S. 34, 46:

> "The words 'due process of law', when applied to judicial proceedings, * * * 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. * * *' "

It does not require a profound exegesis to demonstrate that in the loss of these facilities—which taken singly may not seem of consequence—petitioner has been substantially deprived of the right to proceed in the way contemplated by the statutes and the rules of court. When it has been deprived of this right so to proceed, we urge there is a lack of due process.

Point VII.

THE TAXATION OF COSTS SHOULD BE REVERSED.

If the Court of Appeals lacked jurisdiction, then no costs may be taxed against petitioner.

If the lower court is reversed, then taxation of costs will be reversed.

In any event, however, there is no warrant for taxing against this petitioner any part of the taxable costs and disbursements in *American Safety Table Company* v. *Singer Sewing Machine Company.*

CONCLUSION

For the foregoing reasons it is submitted that the petition herein should be allowed and that the judgment of the Court of Appeals, dated July 6, 1948, and the orders of the Court of Appeals dated respectively, June 20, 1947, April 6, 1948 and October 27, 1948, in so far as the same are here sought to be reviewed, should be reviewed and reversed.

Respectfully submitted,

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

November 30, 1948.

APPENDIX

Order dated June 20, 1947

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 5648
October Term 1934

ROOT REFINING COMPANY,
Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

ORDER*

Present: BIGGS, MARIS, GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

AND NOW, to wit, this 20th day of June, 1947, it is

ORDERED that the intervention of Skelly Oil Company, as prayed for by it, be and the same hereby is authorized and allowed; and it is

*An identical order was entered in case No. 5546, bearing the identical caption.

FURTHER ORDERED that the order of this court of June 15, 1944, setting aside and vacating the judgment of this court entered on June 26, 1935 be and the same hereby is vacated; and it is

FURTHER ORDERED that Universal Oil Products Company appear and show cause, if any there be, why the said judgment of this court entered on June 26, 1935 should not be set aside and vacated by reason of alleged fraud and corruption practiced upon this court by Universal Oil Products Company or those acting on its behalf; and it is

FURTHER ORDERED that the rule to show cause embodied in the preceding paragraph be made returnable on October 13, 1947; and it is

FURTHER ORDERED that the Attorney General of the United States, or some member of the staff of the Department of Justice designated by the Attorney General, be and he hereby is authorized to appear as *amicus curiae*.

By the Court

BIGGS
United States Circuit Judge.

APPENDIX

Order dated April 6, 1948

United States Circuit Court of Appeals

THIRD CIRCUIT

Nos. 5648 and 5546

ROOT REFINING COMPANY,
Defendant-Appellant,

vs.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

This order of court is passed this *sixth* day of April, 1948, in view of the prior proceedings, which for present purposes may be summarized as follows:

1. On the 26th day of June, 1935, judgments were rendered in these cases in accordance with an opinion written by United States Circuit Judge J. Warren Davis, and filed herein on June 26, 1935, 78 F. 2d 991, whereby the Dubbs and Egloff patents were held valid and infringed.

2. On June 5, 1941, an informal hearing was held in these cases by certain judges of this court who did not participate in the decision of these cases, at which hearing there were considered certain statements made by the at-

torneys of the defendants in certain other suits brought in divers District Courts of the United States by Universal Oil Products Company for infringement of the same patents in which suits Universal relied upon the said judgments as precedents or as res adjudicata. Universal was represented by attorneys at said hearing but Root Refining Company was not, since it had made a final settlement with Universal with respect to the matters in litigation. During the hearing, certain matters bearing upon the conduct of Judge Davis in said cases were brought to the attention of the court and the attorneys for the defendants in the cases in other districts were authorized by the court to bring said matters formally to its attention as amici curiae. On June 20, 1941, said attorneys filed a petition as amici curiae in which it was stated that Judge Davis, together with Morgan S. Kaufman, an attorney, and William Fox had been prosecuted under an indictment which charged a conspiracy to obstruct justice, and that Davis had accepted bribes from Kaufman in connection with litigation growing out of the bankruptcy of Fox; and that Fox pleaded guilty, and Davis and Kaufman were twice tried, but that the juries failed to agree. The petition further alleged that the testimony at the criminal trial tended to show that Universal had employed Kaufman as its attorney in these cases in order to effect an illicit arrangement with Davis for Universal's benefit; and that Kaufman had received remuneration from Universal although he was not a patent attorney and had rendered no legal services in the patent cases; and that Kaufman, subsequent to the decision in Universal's favor herein, had loaned $10,000 to Charles Stokley, a cousin of

Davis, in November, 1935, as an indirect means of compensating Davis for his opinion. The petition prayed the court, in the exercise of its inherent power, to inquire into a charge of fraud affecting the integrity of the court, to appoint a special master to investigate and report his conclusions in regard to the charges. Universal, in answer to this petition, denied that it had engaged in any fraudulent practice, but proposed that the judgments be vacated and that the cases be reargued on their merits.

3. On November 26, 1941, the court appointed a special master to investigate and report concerning the charges, and the master conducted an investigation and held hearings at which the amici curiae and the attorneys for Universal participated. On October 19, 1943, the master filed his report in which he found that Davis had been bribed in the patent cases and in the Fox litigation, and that during the years 1935 to 1938 there existed a corrupt and illicit combination between Davis and Kaufman to obstruct justice. Universal filed exceptions to the master's report.

4. On June 15, 1944, the court adopted the master's findings of fact and conclusions of law and vacated the judgments and placed the cases on the reargument list.

5. On May 29, 1944, the Supreme Court rendered an opinion in Universal Co. v. Globe Co., 322 U. S. 471, in which it held that the Dubbs patent was not infringed and the Egloff patent was invalid. The Dubbs patent has since expired.

6. On December 29, 1944, the court filed an opinion, 147 F. 2d 259, wherein it held that Universal should pay a fee to the master for his services and should also pay a fee for services to the attorneys who acted as amici curiae, together with a sum to cover their out-of-pocket expenses. The Supreme Court reviewed this decision on writ of certiorari, in an opinion filed June 10, 1946, 328 U. S. 575. It upheld the order of this court insofar as it directed Universal to pay the master's fees and expenses, but it held that it was improper to require Universal to pay the fees and the expenses of the amici curiae. It pointed out that a federal court has the inherent power to investigate whether a judgment was obtained by fraud, and for this purpose may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But the court pointed out that the special master's investigation was not governed by the customary rules of trial procedure and that the court could not deprive a successful party of his judgment without a proper hearing. Since such a judgment could not be nullified without opportunity to be heard in a proper contest, it was not just to assess against Universal the fees of attorneys and their expenses in conducting the investigation.

7. On October 29, 1946, Skelly Oil Company filed a petition for leave to intervene on the ground that it was engaged in litigation over another patent with Universal in the District Court of Delaware and that said litigation was related to the instant cases and was therefore affected by the fraud perpetrated by Universal therein; and on June

20, 1947, this motion was granted. On March 17, 1948, Skelly petitioned for leave to withdraw from the cases on the ground that it had settled its differences with Universal.

8. On December 19, 1946, Universal called this court's attention to the comments of the Supreme Court in Universal Oil Co. v. Root Rfg. Co., 328 U. S. 575, upon the procedure of the master in conducting the investigation, and moved the court to rescind its order of June 15, 1944, whereby the judgments herein were vacated. On June 20, 1947, this court vacated said order but directed Universal to show cause why said judgments should not be set aside by reason of the fraud alleged to have been practiced by Universal as above described; and at the same time the court authorized the Attorney General of the United States to appear as amicus curiae and granted Skelly's petition for intervention as aforesaid. On July 1, 1947, certain assistants of the Attorney General entered their appearance for the United States, amicus. On July 30, 1947, the original amici curiae withdrew.

9. On September 18, 1947, Universal petitioned the Supreme Court for writs of certiorari and for leave to file petitions for writ of mandamus and prohibition to forbid further proceedings in the instant cases in this court on the ground that there was no case or controversy before the court and hence the court was without power to require Universal to show cause why the judgments should not be vacated. On November 10, 1947, the Supreme Court denied these petitions. See 16 Law Week, 3086 and 3150.

Appendix

10. On December 26, 1947, the Senior Judge of the Third Judicial Circuit of the United States certified that by reason of the volume, accumulation, or urgency of business in the circuit, or the disability or necessary absence from the circuit of one or more of the circuit judges, the Circuit Court of Appeals of the circuit was unable to perform speedily the work brought before it, and on January 16, 1948, the Chief Justice of the United States designated and assigned the Honorable E. Barrett Prettyman, the Honorable John C. Mahoney, and the Honorable Morris A. Soper to act as circuit judges in such circuit and discharge all of the official duties of the circuit judges thereof in connection with the following cases: Root Refining Company v. Universal Oil Products Company, No. 5546; Root Refining Company v. Universal Oil Products Company, No. 5648, and American Safety Table Company v. Singer Sewing Machine Company, No. 6459, such designation and assignment to be for the period required to enable the said designated and assigned judges to dispose of said cases.

11. On December 31, 1947, William Whitman Co., Inc., petitioned for leave to intervene in these cases stating that Universal had sued Whitman's predecessor for infringement of the patents involved herein, and, on the strength of the judgments herein, had induced said predecessor to take a license under the patents and pay royalties to Universal until June 15, 1944, when the judgments herein were vacated; that Whitman had sued Universal in the District Court of Delaware for the revocation of the licenses and the repayment of the royalties on the ground that said

judgments were procured by fraud, as found in the master's report, and hence Whitman has an interest in the outcome of the present proceedings and should be allowed to participate therein.

12. On February 10, 1948, Universal, begging leave if thereafter necessary to deny any charges of fraud or wrongdoing on its part, moved the court to dismiss the rule to show cause imposed upon it on June 20, 1947, contending that any controversy heretofore existing in these cases is now moot since it has reached a settlement with the Root Refining Company, and since one of the patents involved has been declared invalid by the Supreme Court and the other patent has expired; that Skelly has no standing to answer any claim adverse to Universal in this proceeding, and that the court is without jurisdiction to continue the proceeding since there is no justiciable case or controversy before it.

13. On February 16, 1948, Universal filed a memorandum in opposition to the motion of Whitman to intervene, contending that there is no case or controversy within the court's jurisdiction; that intervention should not be permitted in the Circuit Court of Appeals, and that Whitman and its predecessor have been guilty of laches.

14. On February , 1948, a statement of ultimate facts relating to the proceedings and the charges of fraud in this case was filed by Assistants of the Attorney General in the name of the United States amicus curiae, and on March 8, 1948, Universal filed a reply in opposition thereto

and a motion to strike the same from the records of the court.

In the light of the facts above recited, it is ordered:

A. That Skelly's motion to withdraw from the cases as intervenor be granted upon the condition that the factual data assembled by it shall be made available to the court at any time during the course of the proceeding that the court deems it desirable.

B. That the United States through the Assistant Attorneys General designated by the Attorney General be authorized to participate in this proceeding as amicus curiae.

C. That the motion of Universal that the statements of the United States as amicus curiae be stricken from the records and the motion that these proceedings be dismissed be denied.

D. That the motion of Whitman to intervene be granted.

It is further ordered that in view of the report of the special master and the allegations of wrong-doing set forth by the United States as amicus curiae and by the William Whitman Company the court deems it necessary to determine whether J. Warren Davis, a member of this court, was improperly influenced in his action in these cases by the hope of gain or reward, and whether the judgment of this court in these cases was secured by fraud or wrong-doing

on the part of Universal Oil Products Company or any one acting in its behalf, and to that end sets forth the charges that have been made and are to be tried as follows:

(a) Whether Judge J. Warren Davis' action in these cases was influenced by the expectation of gain or favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman.

(b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of $10,000 to one Charles Stokley, a cousin of Judge Davis, were the means whereby Judge Davis was compensated in whole or in part for his decision favorable to Universal Oil Products Company in these cases, and whether certain other transactions between Judge Davis and Morgan S. Kaufman during the period 1935 to 1938 allegedly related to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice.

(c) Whether Morgan S. Kaufman was employed or retained by Universal Oil Products Company in connection with these cases and, if so, whether the purpose of such employment or retainer was the expectation of Universal Oil Products Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with these cases.

It is further ordered that the motions and response filed herein by Universal be accepted as a general denial of all

allegations of wrong-doing above set out with leave to file an additional answer if it so desires on or before April 15, 1948.

And it is further ordered that in the trial of these charges the amicus curiae shall have the duty to present to the court the available evidence bearing upon the charges, whether or not it supports the charges, to the end that the truth may be ascertained; and that Whitman and Universal shall have full opportunity to present evidence bearing on the charges and to participate in the examination and cross-examination of witnesses and in the argument before the court, so that the customary procedure of an adversary proceeding may be observed.

And it is further ordered that the trial of the charges above set forth be consolidated with the trial of the charges set forth in the order of this court passed this day in Case No. 6459, American Safety Table Company v. Singer Sewing Machine Company, to the following extent, that is to say, the evidence in Cases Nos. 5648 and 5546, Root Refining Company v. Universal Oil Products Company shall first be taken and the privilege shall be accorded to Counsel for the respective parties in Number 6459 to cross examine the witnesses if they so desire, and that said testimony, when completed, shall be stipulated and accepted by counsel in Number 6459 as testimony to be considered in that case, and thereafter additional testimony may be taken in Number 6459, if counsel for either party or counsel for the United States, amicus curiae, so desire.

And it is further ordered that the costs of this proceeding shall be assessed at the conclusion of the trial against

the parties participating therein or any of them as the court may determine.

It is further ordered that the case be set for the hearing of testimony before the court at Philadelphia on May 10, 1948, and thence continuously from day to day until completed. Daily copy and daily topical index of testimony are to be furnished by counsel.

MORRIS A. SOPER,
United States Circuit Judge.

JOHN C. MAHONEY,
United States Circuit Judge.

E. BARRETT PRETTYMAN,
Associate Justice, United States Court of Appeals of the District of Columbia.

APPENDIX

Judgment dated July 6, 1948

United States Circuit Court of Appeals

THIRD CIRCUIT

Nos. 5648 and 5546

ROOT REFINING COMPANY,
Defendant-Appellant,

versus

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

Upon the findings of fact and conclusions of law set out in the opinion of this court this day filed in these cases, it is ordered, adjudged and decreed by the United States Circuit Court of Appeals for the Third Judicial Circuit this 6th day of July, 1948:

That the mandate of this court issued in these cases on October 30, 1935, be recalled, and that the order of this court of June 26, 1935, affirming the decree of the District Court be vacated, and that the cases be and they are hereby remanded to the District Court with directions to vacate its judgments herein and dismiss the bills of complaint.

It is further ordered that the costs of this proceeding, including the costs incurred in these cases and also in

Appendix

No. 6459, American Safety Table Company versus Singer Sewing Machine Company, consolidated for trial with these cases by the order of this court of April 6, 1948, be paid, four-fifths by Universal Oil Products Company and one-fifth by the American Safety Table Company.

/s/ MORRIS A. SOPER
United States Circuit Judge

/s/ JOHN C. MAHONEY
United States Circuit Judge

/s/ E. BARRETT PRETTYMAN
Associate Justice of the Court of Appeals of the District of Columbia

APPENDIX

Order dated October 27, 1948

United States Court of Appeals

THIRD CIRCUIT

IN RE

Nos. 5648 and 5546

ROOT REFINING COMPANY

v.

UNIVERSAL OIL PRODUCTS COMPANY

No. 6459

AMERICAN SAFETY TABLE COMPANY

v.

SINGER SEWING MACHINE COMPANY.

ORDER OF COURT UPON APPLICATIONS OF THE PARTIES FOR THE ALLOWANCE OF COSTS AND COUNSEL FEES.

Applications have been made to the court for the allowance of costs and counsel fees by the Attorney General, as the Attorney for the United States as amicus curiae, the William Whitman Company and Singer Sewing Machine Company.

Appendix

On July 23, 1948, Singer presented to the court a memorandum of an application for the allowance of costs and counsel fees and expenses in American Safety Table Company v. Singer Sewing Machine Company. On or about July 26, 1948, the United States made a similar application in both cases.

William Whitman Company formerly asked for counsel fees in its original application for intervention in Root Refining Company v. Universal Oil Products Company, and argued the same prior to the decree of this special court striking out the judgment therein. On July 31, 1948, Whitman expressed to the court its intention to press its application in respect to costs and counsel fees. Subsequently, on September 8, 1948, Whitman presented a bill for costs in this proceeding but did not present to this court a bill for counsel fees, reserving the right to assert and recover counsel fees in its suit against Universal Oil Products Company for the return of royalties in the District Court of Delaware; and at the hearing herein on October 25, 1948, Whitman presented no claim for counsel fees but made the same reservation.

At said hearing, the attorney for the United States expressed some doubt as to the propriety of allowing counsel fees to the United States and submitted the matter to the discretion of the court. At said hearing Singer pressed its application for counsel fees and costs as originally presented.

The decision in Sprague v. Ticonic, 307 U. S. 161, and Universal Oil Products Company v. Root Refining Co., 328 U. S. 575, establish the principle that in the exercise of their equitable jurisdiction the Federal courts may in their discretion allow not only what are known as costs between

party and party, but also costs as between solicitor and client. In the pending cases, however, we think the allowance to the successful parties should be confined to costs between party and party, and restricted to the items that will be set out below in this order. In rejecting the application for the payment of solicitor and client costs, we are influenced by the following considerations:

The proceeding before this court to vacate the judgment in Root Refining Company v. Universal Oil Products Company, while suggested originally by private parties, was undertaken and prosecuted as an investigation by the court itself into the integrity of its own judgment; and it would have proceeded to a final conclusion with or without the assistance or intervention of private parties. In fact, the original proceeding in Root Refining Company v. Universal Oil Products Company was brought to what was deemed to be a final conclusion and the judgment of the court was stricken out before the private parties now before the court, either in that case or in the case of American Safety Table Company v. Singer Sewing Machine Company, had appeared or asked to intervene. It was not until the order vacating the judgment in the first named case had been vacated* that Whitman intervened in the first named case and the Singer Sewing Machine Company filed a petition for the recall of the mandate and a reargument of the case of the American Safety Table Company; and while their efforts in the present proceeding have been helpful, they have not contributed greatly to the information already contained in the first record. In short, the case against the Universal Oil Products Company was made out before their entry, and they

*See Order dated October 29, 1948, p. xxii, *infra*.

have come in to reap the benefits of the disclosures, Whitman in order to advance its suit for a return of royalties which it has paid the Universal Oil Products Company, and Singer to secure a reversal of a decree in favor of the American Safety Table Company, both relying on the disclosures as to the relationship between Davis and Kaufman which had been made through the labors of their predecessors. It would be inappropriate, under these circumstances, to allow them payment for counsel fees which, under the decision in Universal Oil Products Company v. Root Refining Company, supra, was denied to those who first brought the incriminating evidence together. It should also be noted that Singer, although pressing its claim for counsel fees at this time, asked no more at the beginning of its entry in these proceedings than a recall of the mandate in the American Safety Table Company case, and a reargument of the case on its merits. Singer has gained far more through the insistence of this court on a complete investigation than it originally sought.

Furthermore, it is important to bear in mind that by the order of the present special court the prosecution of this proceeding and investigation was entrusted at the beginning to the Attorney General, as attorney for the United States as amicus curiae, and although the attorneys for the private parties have willingly cooperated, the burden of the case has been borne by the attorney of the United States.

Nor do we think that fees and expenses should be allowed to the legal representative of the Attorney General who appeared in this proceeding for the United States as amicus curiae. The matter did not concern merely private parties, but issues of great moment involving the integrity of the court itself were subjected to examination. It was

pointed out in Universal Oil Products Company v. Root Refining Company that a federal court can always call on law officers of the United States to serve as amici. Their appearance in the public interest in the proceeding at bar was singularly appropriate. Their assistance was invaluable and has been duly recognized in the opinion of the court, but in our judgment the contribution of the United States in counsel fees and legal expenses should be paid from the public treasury.

The William Whitman Company has requested the court to rule that the denial of its application for counsel fees and expenses be without prejudice to its right to claim said fees in its suit against Universal Oil Products Company in the District of Delaware. Singer has asked the court to rule that the denial of its application for counsel fees and expenses be without prejudice to any claim for said fees and expenses which it may present either in the proceedings that may follow the recall of the mandate in American Safety Table Company v. Singer Sewing Machine Company, or in any other proceeding.

In this situation, it is ordered that [*sic*] 27th days of October, 1948:

1. That the foregoing applications for counsel fees and expenses in these proceedings be denied.

2. That the request that said denial be without prejudice to subsequent claims of Whitman and Singer, as above set out, be also denied, it being the intention of the court finally to adjudicate the question of counsel fees and expenses incurred in this proceeding; but this ruling relates only to counsel fees and expenses of said parties in the proceeding before this specially designated court.

3. It is further ordered that the costs of the successful parties in this proceeding be allowed as follows:

(a) The cost of five copies of the stenographer's transcript of record, consisting of three copies furnished to the members of the court, one copy to the clerk of the court, and one copy for the use of the attorney who prepared the topical index.

(b) Witness fees.

(c) The costs of the original and one copy of the depositions filed in the proceedings.

(d) The costs of four photostatic copies of exhibits filed in the proceedings.

(e) The printing costs of petitions, briefs and statements of counsel filed with the court, not to exceed $2.50 a page.

4. It is further ordered that counsel present to the clerk of this court itemized statements of the costs in accordance with the foregoing provisions, and that the clerk of the court tax the costs accordingly.

5. It is further ordered that a copy of this order, if desired by any counsel, be included in the transcript of record to be filed in the Supreme Court in connection with the applications for writ of certiorari.

MORRIS A. SOPER,
United States Circuit Judge.

E. BARRETT PRETTYMAN,
Associate Justice, Court of Appeals of the District of Columbia.

APPENDIX

Order dated October 29, 1948

United States Court of Appeals

THIRD CIRCUIT

IN RE

Nos. 5648 and 5546

ROOT REFINING COMPANY

v.

UNIVERSAL OIL PRODUCTS COMPANY.

No. 6459

AMERICAN SAFETY TABLE COMPANY

v.

SINGER SEWING MACHINE COMPANY.

ORDERED this 29th day of October, 1948: That the order of this court filed herein on the 27th day of October, 1948, be amended by striking out the word "vacated" on the last line of page 2 [page xviii, line 22], and substituting therefor the word "filed".

MORRIS A. SOPER,
United States Circuit Judge.

E. BARRETT PRETTYMAN,
Associate Justice, United States Court of Appeals, District of Columbia.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 439-440

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

REPLY BRIEF OF PETITIONER, UNIVERSAL OIL PRODUCTS COMPANY (IN ANSWER TO OPPOSING BRIEFS OF UNITED STATES, AS *AMICUS CURIAE*, AND WILLIAM WHITMAN COMPANY, INC.)

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

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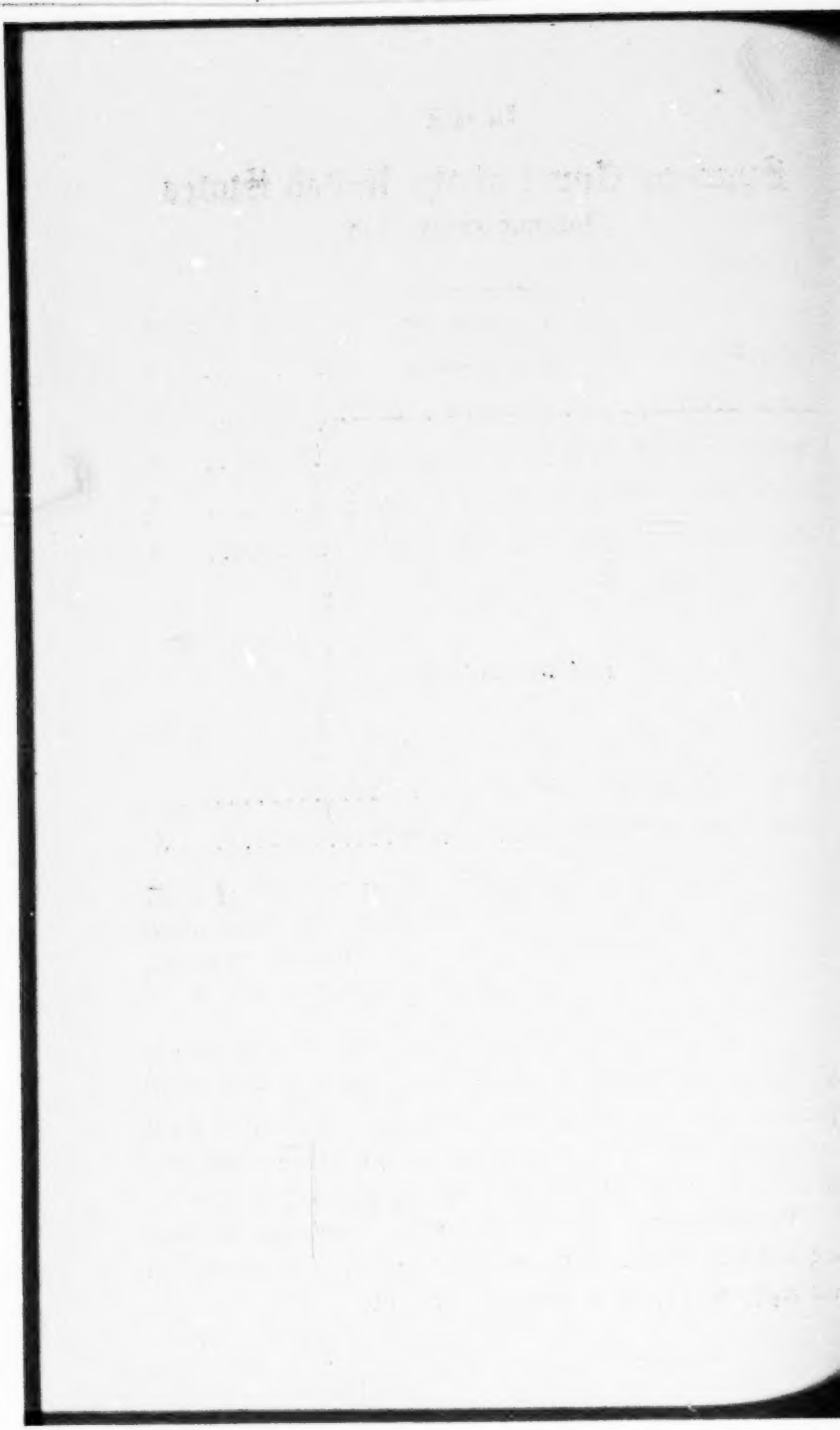

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 439-440

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

REPLY BRIEF OF PETITIONER, UNIVERSAL OIL PRODUCTS COMPANY (IN ANSWER TO OPPOSING BRIEFS OF UNITED STATES, AS *AMICUS CURIAE*, AND WILLIAM WHITMAN COMPANY, INC.)

The briefs of *Amicus Curiae* and William Whitman Company, Inc. in opposition to the petition and brief of petitioner require some answer, although a reading of them sufficiently discloses that they fail adequately and sincerely to come to grips with the matters advanced by petitioner.

The answering briefs contain inaccuracies and misleading nuances which, but for the necessity for brevity in our reply, we should be anxious to refute.

Aside from these inaccuracies (none of which we deem of sufficient importance to reply to but all of which seem designed to create a hostile atmosphere), the briefs in opposition play and re-play *ad nauseam* two melancholy airs.

The first of these is that petitioner is now for the eighth time raising the constitutional question of whether or not there was a "case" or "controversy" in the court below.

Whitman (Br. p. 29) concludes its oft-repeated flagellation of petitioner as follows:

> "Universal's resort to repeated petitions for writs of *certiorari,* repeated applications to file petitions in mandamus, and again in prohibition, has degenerated into mere legal showmanship and the time has come when this Court can put a period to this surfeit of legal expedients."

If petitioner had refused as obstinately as depicted by Whitman and *Amicus* to bow to the mandates of this Court, then indeed it would have merited the scolding to which it has been subjected in the opposition briefs. But smartly worded phrases are all too often glittering examples that the wish is father to the thought; as is usually the case, the prejudicial effect of such generalities can quickly be scotched by the recitation of the facts.

It is true that petitioner raised these constitutional questions before the master and the Court of Appeals for the Third Circuit. They were not referred to in the report of the master although his denial of a proposed conclusion of law upon that subject indicated that he had passed upon that issue adversely to petitioner. In passing upon the master's report, the Court of Appeals wrote no opinion but adopted his report, findings and conclusions.

When petitioner applied to this Court early in 1945 for writs of prohibition and/or mandamus, these questions were raised. The remedy of prohibition and mandamus, though drastic, was invoked by petitioner as a precautionary measure. This Court in denying those writs specifically stated that its determination was "without prejudice" to petitioner's right to apply for writs of *certiorari*. Petitioner, being in doubt as to whether the Court intended the petitions for writs of *certiorari* to be sought under section 262 or section 240(a) of the old Judicial Code (both being competent to raise the question of jurisdiction of the court below), asked this Court, by way of a motion for a rehearing of the petitions for writs of prohibition and mandamus, for a clarification of its language. This petition was denied. Petitioner thereupon applied for writs of *certiorari* under both section 262 and section 240(a). Both writs were granted. In both proceedings the question of whether or not there was a "case" or "controversy" before the court below was specifically raised. On the arguments and in the briefs before the Court that question was pressed by petitioner and vigorously opposed by *Amici Curiae*. (No party was before the court except your petitioner and former *Amici Curiae* who, by special order of this Court, were permitted to submit a brief and participate in the argument.) This Court handed down its opinion, which is reported in 328 U. S. 575, in which it reversed the order of the Court of Appeals sought to be reviewed. The reversal was ordered under the writ of *certiorari* issued pursuant to section 240(a). The writ issued under section 262 was thereupon dismissed by this Court.

Petitioner regarded the opinion of this Court above referred to as a holding not only that petitioner had been deprived of due process by the proceedings theretofore had

below but, at least implicitly, that there was before the court below no "case" or "controversy" in the constitutional sense.

Accordingly, petitioner urged upon the Court of Appeals for the Third Circuit that the entire proceedings should be dismissed. After extended argument, elaborate briefs and an extensive consideration, the Court of Appeals issued orders in which it undid all that had theretofore been done in the proceedings, namely, it set aside its order which had vacated the Root judgments of affirmance for fraud and also set aside its adoption of the report, findings of fact and conclusions of law of the master. Such action was wholly consistent with the claim by petitioner that there existed no "case" or "controversy" before the court. But the order went on and, among other things, required petitioner to show cause at a stated time why the Root judgments should not be set aside for fraud.

In view, however, of the uncertainty as to what the effect of the order of the Court of Appeals was, petitioner filed in the fall of 1947 petitions for writs of prohibition and mandamus seeking a determination by this Court of whether or not any justiciable controversy existed in the court below. Those petitions were all denied by this Court (332 U. S. 813), because, petitioner assumed, they were premature. In any event, the denial of such petitions for writs of prohibition, mandamus or *certiorari* is without legal significance on this petition. *Ex Parte Abernathy,* 320 U. S. 219; *Atlantic Coast Line R. Co.* v. *Powe,* 283 U. S. 401, 403-4; *United States* v. *Carver,* 260 U. S. 482, 490; *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258; *Accord: House* v. *Mayo,* 324 U. S. 42, 47-8.

Before hearings were had upon the order to show cause, the regular members of the Court of Appeals were relieved

by a designation by the Chief Justice of the United States of three outside judges to conduct the proceedings in the matter.

The Court of Appeals as thus specially constituted announced that it was prepared to receive all objections including objections to jurisdiction and, accordingly, petitioner urged that there existed no "case" or "controversy" before that court. Petitioner's objections were overruled. Petitioner now seeks a definitive determination of the constitutional question involved and respectfully submits that either its position has been already upheld by this Court, at least implicitly in 328 U. S. 575, or else this Court failed in that decision to pass directly upon the question. In neither case, we respectfully submit, can petitioner properly be criticized, as it has been at such great length in the briefs of *Amicus* and Whitman, for seeking a definitive clarification of this issue.

The other topic upon which Whitman, to some extent, and *Amicus*, to a considerable extent, dwell in their briefs is a so-called discussion of the merits of whether or not petitioner can be held responsible for the alleged bribery of Judge Davis by Kaufman, one of its attorneys.

We suggest that that question is not now properly before the Court. If the petition and a review of the merits is granted, petitioner will vigorously maintain that the record does not sustain the conclusion of the lower court, that the findings of fact are tenuous and inferential, and that they fly in the face of all of the direct testimony.

In any event, the whole argument of *Amicus* is illusory and specious for instead of arguing the facts from the record, it merely summarizes and cites to the lower court's opinion. For the purpose both of this petition and the

argument on the hearing on the merits, if granted, the question is not whether the lower court made certain findings but whether those findings are justified. *Amicus* does not in any respect attempt to support the findings by reference to the record with one exception,—two footnotes on page 23 of the brief of *Amicus*. These references to the evidence are not in and of themselves adequate to support the opinion upon which *Amicus* really relies.

While we see no advantage upon this application in discussing the merits of the findings, both *Amicus* and Whitman may have created a prejudicial atmosphere requiring a short rebuttal.

Every person alive in 1941, when the investigation was started, who might have had any knowledge of the Universal-Kaufman employment was produced and examined; that testimony was before the court in the latest hearing. Each of these witnesses categorically denied every fact essential to the proof of bribery and, on the contrary, gave, we submit, convincing sworn testimony to the effect that there was no bribery. The documentary evidence as a whole, we submit, sustained their oral testimony. Only by means of strained inferences did the court below find, in the face of this direct testimony, that there was a bribe.

The alleged bribe, charged by *Amicus* and Whitman, was incredibly fantastic, an Alice-in-Wonderland scheme.

The bribery plan is claimed to have taken the form of a loan of $10,000 by Universal's counsel, Kaufman, to Judge Davis' cousin upon the concededly ample security of Florida real estate. The loan was actually made to Judge Davis' cousin by means of a payment of $10,000 directly from Kaufman to municipal authorities in Florida to redeem Davis' cousin's orange grove property from a tax lien sale.

Upon receipt of the $10,000, the municipality conveyed the foreclosed real estate to Kaufman as security for his loan, to be repaid by Davis' cousin to Kaufman pursuant to a written agreement between them, in which event Kaufman agreed to reconvey the property to Davis' cousin.

Shortly thereafter Judge Davis himself loaned his cousin $4,000 to permit the cousin to continue in business.

Subsequently and over a period of several years, Davis' cousin made certain relatively small payments to Davis. These payments, it is now claimed, were made by Stokley to Davis on account of the Kaufman loan rather than on account of the loan by Judge Davis, although all parties categorically denied such to be the fact and Davis' records showed that all payments were applied against the $4,000 loan.

The attempt to attribute these payments to the Kaufman loan was accomplished by a metaphysical *tour de force*.

The theory by which this loan from Kaufman to Davis' cousin Stokley was metamorphosed into a bribe of Davis was that ultimately the entire $10,000 was to be repaid by Stokley, not to Kaufman, but to Davis, whereupon it is claimed, no agreement or testimony to that effect having been offered, that Kaufman would reconvey the property to Stokley and cancel his obligation. This, we submit, is incredible. Concededly, Judge Davis was in dire financial straits, hence he would not have been satisfied with any such loose arrangement as this.

In the first place, he would have demanded an effective, though clandestine, bribe. Yet the transaction which *Amicus* and Whitman indict was legally and actually ineffectual and was open, notorious and a matter of public record. Davis freely corresponded with Stokley and others

about the transaction, permitted the use of his secretary to draft the papers and of his law clerk to close the transaction and the whole matter was carried out in an atmosphere of complete candor.

In the second place, since Judge Davis was in dire need of funds, it is inherently incredible that the alleged arrangement was that Judge Davis' cousin would trickle over the years small amounts back to Judge Davis. This conclusion is emphasized when it is recalled that Davis, had Kaufman actually been bribing him in the Universal case, could have demanded and received the bribe in cash directly from Kaufman; that Kaufman, had he been a briber, and Davis would have preferred a hidden, though effectual, payment; that since a cash payment would have been effectual, Davis would have received some immediate substantial benefit, which, in his straitened financial circumstances, was supposed to be the motivation of the bribe.

Amicus, however, contends that the bribe was left to the voluntary cooperation of Davis' cousin and Kaufman; that is, that Davis' cousin would pay the money in dribs and drabs to Davis (although he was legally obligated to make the payments to Kaufman more promptly) and that Kaufman would reconvey the property when the payments to Davis had aggregated $10,000 and interest.

While Stokley, Davis' cousin, may have been a fool, we submit that it is beyond ordinary human experience to assume that he would have thus placed himself in jeopardy of being compelled to make the payments twice. This is so because, according to the theory of *Amicus,* he had no legally enforceable right to compel Kaufman to reconvey the property even though he had made the $10,000 and interest payments to Davis. On the other hand, Davis could have claimed that the first $4,000 was on account of the loan

which he had made to Stokley and that the other payments were gifts or loans or payments of other indebtedness from his cousin to him. By the same token, Kaufman could have claimed that he had received nothing and therefore could have kept the property.

Judge Davis was well aware of the financial condition of his cousin and that the possibility of his ever having $10,000 was problematical. Since the $10,000 went to the Florida municipality, Davis would have had to rely upon his impecunious cousin's ability to earn and repay to him the $10,000, plus the $4,000 which he himself had loaned his cousin, before the full benefit would have accrued to Judge Davis.

This is the bribe which *Amicus* and Whitman urged was made for a favorable decision in a case which they describe as of such vital importance to petitioner.

No; Davis, impecunious as he was, would not have been satisfied with such a trickling bribe and one which he could at no time enforce, nor would his cousin have placed himself in the position where, after paying Davis the full $10,000 and interest, he still could not get back his property.

Contrast this transaction with the alleged bribe of Davis by Fox, occurring, it was claimed, about a year after the Stokley loan. In the Davis-Fox matter cash was used, $15,000 in one case and $12,500 in another. This transaction was carried on secretly; no record was made of it. The cash payment, but for the fact that in one instance large bills were used which could be traced through the Federal Reserve System, was almost impossible of detection. On the other hand, the alleged bribe for which Universal stands here condemned is claimed to have been made in the insecure, ineffectual yet wholly overt manner above described.

These are some of the arguments which we shall expect to make to this Court if the petitions for *certiorari* are granted. We see no reason for further elaboration at this time and merely set forth the foregoing in response to what we regard as an improper introduction of the merits of the case by *Amicus* upon this petition.

Petitioner most earnestly and vigorously denies any guilt or complicity in tampering with justice. Its reputation has been unsullied throughout its years of existence. It is now held as a great public trust for scientific, experimental and research work and it desires, even though its officers and directors and stockholders are wholly different from what they were in 1935, to clear its corporate name from the unjust stigma of the judgment below. It protests not that it was weak, but that it was innocent.

While, as we stated at the outset, numerous other inaccuracies and prejudicail matters occurred, we believe that for the purpose of this application the foregoing response is sufficient.

Respectfully submitted,

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

January 13, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 439-440

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

MOTION AND PETITION TO DISPENSE WITH THE PRINTING OF THE RECORD REQUIRED UNDER RULE 38(1)(7) ON CONSIDERATION OF PETITION FOR WRITS OF CERTIORARI

RALPH S. HARRIS,
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JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

NOW comes Universal Oil Products Company, the petitioner herein, and on the annexed petition, verified the 30th day of November, 1948, and on the record in this matter on file with the Clerk of this Court, hereby moves this Court for an order dispensing with the printing of said record for the purpose of application to this Court for writs of *certiorari* to the United States Court of Appeals for the Third Circuit.

Dated: November 30, 1948.

Yours, etc.,

RALPH S. HARRIS,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
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and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

PETITION TO DISPENSE WITH THE PRINTING OF THE RECORD REQUIRED UNDER RULE 38(1)(7) ON CONSIDERATION OF PETITION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Universal Oil Products Company respectfully shows:

Petitioner has, simultaneously with this petition, filed with this Court a petition for writs of *certiorari,* pursuant

to Title 28, United States Code, Section 1254(1), to review a judgment of the United States Court of Appeals for the Third Circuit, captioned "Root Refining Company, Defendant-Appellant, versus Universal Oil Products Company, Plaintiff-Appellee" and filed July 6, 1948, and to review certain orders or portions thereof entered by said court in the same matter on June 20, 1947, April 6, 1948, and October 27, 1948, respectively.

The opinion of the said Court of Appeals is reported in 169 F. 2d 514.

Prior to rendering the judgment of which review is now sought, the Court of Appeals for the Third Circuit heard the proceedings in the first instance and received evidence consisting of testimony of witnesses and documentary exhibits.

The transcript of the proceedings certified to this Court by the Clerk of the Court of Appeals for the Third Circuit is extremely voluminous, consisting of more than 2500 typewritten pages of testimony and over 300 exhibits, which, it is estimated, contain over 1000 pages of typewritten or printed material. To print the certified transcript of the record would be both burdensome and unduly expensive.

For the convenience of the Court, petitioner is submitting with its petition for writs of *certiorari* an appendix containing certain documents to which reference is made in its petition and brief.

WHEREFORE, petitioner prays for an order dispensing with the printing of the record in the above-entitled matter, as certified by the Clerk of the Court of Appeals for the

Third Circuit, on consideration of the petition for writs of *certiorari* filed by Universal Oil Products Company.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

By: RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. McCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

Dated: November 30, 1948.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RALPH S. HARRIS, being duly sworn, deposes and says: that he is attorney for Universal Oil Products Company, the petitioner named in the foregoing petition; that he has read the foregoing petition and that the same is true to the best of his knowledge, information and belief.

(Signed) RALPH S. HARRIS

Sworn to before me this
30th day of November, 1948.

GEORGE W. HANCOCK
Notary Public in the State of New York
Residing in Nassau County
Nassau County Clerk's No. 1495
Certificates filed in
N. Y. Co. Clk's No. 889, Reg. No. 355-H-9
Kings Co. Clk's No. 78, Reg. No. 516-H-9
Term Expires March 30, 1949

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In the Supreme Court of the United States

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Nos. 439 - 440.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

BRIEF OF
WILLIAM WHITMAN COMPANY, INC.
(Against Petitions for Writs of Certiorari).

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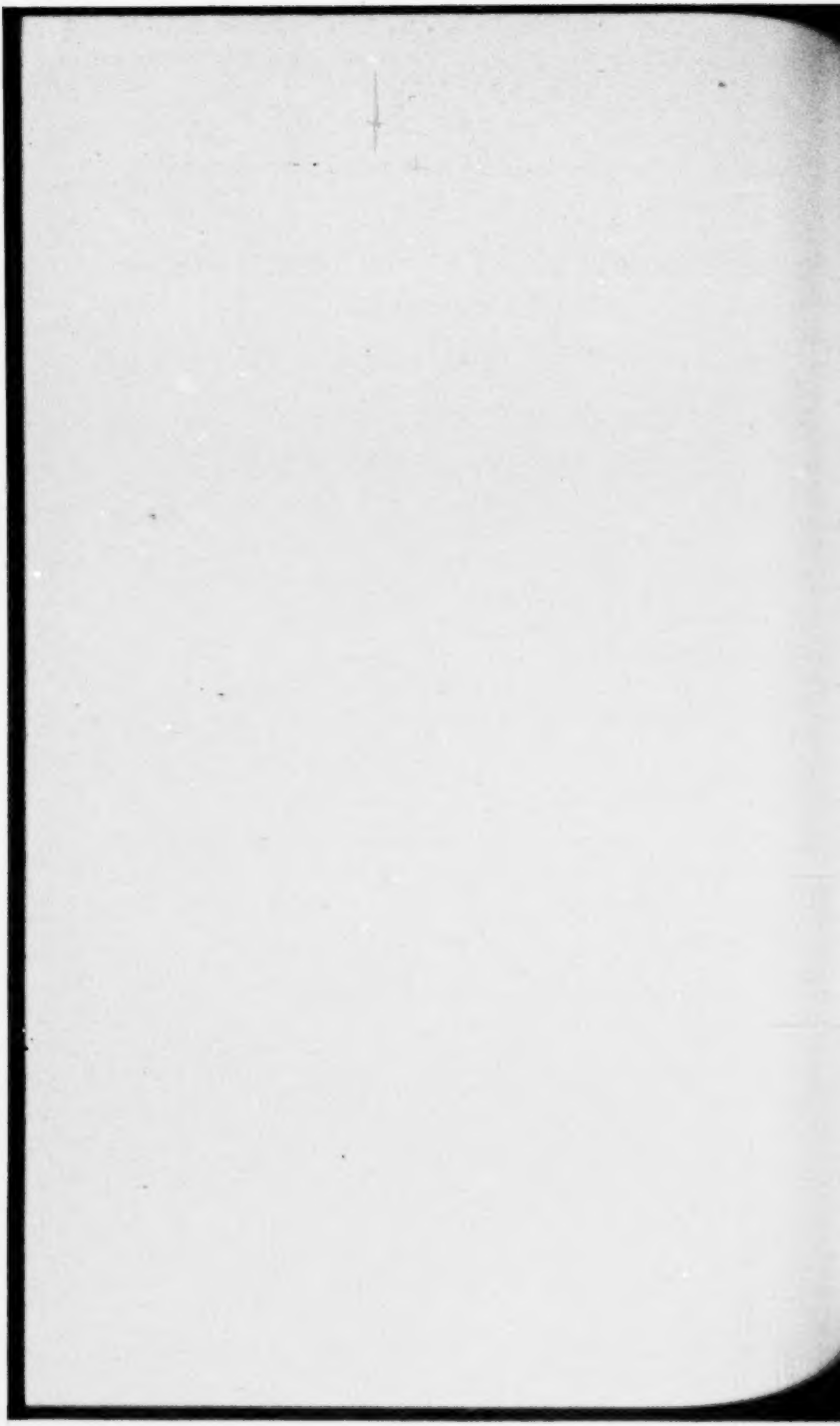

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Intervenor-Respondent.

BRIEF OF
WILLIAM WHITMAN COMPANY, INC.
(Against Petitions for Writs of Certiorari).

THE FACTS.

Universal Oil Products Company, a Delaware corporation, and its predecessor corporation of the same name, is a huge patent holding company and the owner of many hundreds, perhaps thousands, of patents relating to methods and processes of cracking oil and the resultant products. Until its first conviction of bribery, 1944, Universal's stockholders were several large oil companies, The Standard Oil Company of California, The Shell Union Oil Corporation and the Atlantic Refining Company. Its business was the granting of patent licenses to other oil refining companies, from whom it received many millions of dollars in royalties, and the active prosecution of patent infringement suits against rebellious potential licensees.

The nucleus of its licensing system was two patents, the Egloff, No. 1,537,593, and the Dubbs, No. 1,392,629;

were these two lost then, as Universal's president himself testified, its entire licensing system would collapse—as indeed ultimately happened. Upon these patents dozens of infringement suits were instituted and maintained by Universal in federal district courts from coast to coast during the period 1929 to 1940.

Among such actions were two instituted against the Root Refining Company, in the Delaware District Court, one filed in 1929 (the Egloff patent) and the other in 1931 (the Dubbs patent). These two cases were consolidated for trial and are the cases now before this Court.

A number of lesser refining companies, actual or potential defendants in suits filed by Universal, were using an identical but unpatented process for cracking oil, installed in their plants by The Winkler-Koch Engineering Company, and generally known as the "Winkler-Koch process." To provide a common defense against Universal's multiple attacks and to build up an adequate fund, those users of the Winkler-Koch process banded together and organized The Winkler-Koch Patent Company, to which each member contributed funds calculated upon its barrel production. A Company Committee was created with full power to control such litigation against its members and to select, provide and pay defense counsel for all members and also to pay expenses of litigation.

The Root Refining Company was a contributing member of said Patent Company (its president being on the Company Committee) and the counsel appearing in its behalf throughout the trial of the Delaware infringement suits instituted by Universal were selected, controlled and paid by the Patent Company Committee.

Another member of the Patent Company, also making pro rata contributions to the common defense fund, was The National Refining Company of Cleveland, Ohio. (William Whitman Company, Inc. is a new name for the corporation formerly known as The National Refining Com-

pany—so that whenever the name The National Refining Company appears, the name of William Whitman Company, Inc. may be substituted.) The National Refining Company was the defendant in a similar infringement suit filed September 30, 1931 by Universal in the Federal district court at Cleveland, Ohio.

The two actions against Root Refining Company in the Delaware District Court were tried in 1932; in April 1934 opinion was rendered sustaining the validity of both the Dubbs and Egloff patents, finding infringement thereof by Root's use of the Winkler-Koch system and awarding an injunction and accounting. Interlocutory decrees of the District Court pursuant thereto were entered in May 1934.

Appeals by the defendant, Root Refining Company (still represented by the same counsel selected and paid by the Patent Committee), were duly prosecuted to the Third Circuit Court of Appeals and extended argument had before Judges Davis, Buffington and Thompson in January 1935. Almost simultaneously the Cleveland suit against The National Refining Company reached trial status and over the vigorous protest of The National Refining Company, Universal dismissed the Cleveland suit February 26, 1935. Immediately thereafter, however, April 1, 1935, Universal filed a new infringement suit against National, but this time in Kansas, where National had a refining plant, and involving the same Dubbs and Egloff patents. In said Kansas suit National was represented by the same patent counsel who represented Root and who were selected and paid by the Patent Company.

On June 26, 1935, five months after the argument of the cases, the Third Circuit Court of Appeals rendered its opinion, written by Judge Davis, affirming the decision of the district court. Petition for rehearing was denied and Root's petition for certiorari to the Supreme Court of the United States was prosecuted and denied; on October 31, 1935, the mandates of the Third Circuit Court of Appeals went down to the Delaware District Court.

In the early part of 1937 the Kansas case against The National Refining Company reached trial status and active preparations for defense were under way. Then on March 13, 1937, Universal filed in that case an "Amendment to Bill of Complaint" which brought about a completely changed outlook. In that Amendment Universal set out the Delaware actions against Root Refining Company which had involved infringement of the same Egloff and Dubbs patents and the decree of June 26, 1935 by the Third Circuit Court of Appeals affirming in all respects the decree of the Delaware District Court (opinion reported in 78 F. 2d 991); Universal further set up in detail the organization, objectives and purposes of The Winkler-Koch Patent Company, its control and defense of suits against its members, National's and Root's participation and contribution, the control and payments for the defense of Root in the Delaware District Court and subsequent appeals, and finally averred that "the decree entered as aforesaid in said cases by Universal Oil Products Company against Root Refining Company, and all questions which were or might have been raised on behalf of National in said suits, is or are now *res adjudicata.*"

After the filing of said Amendment to Bill of Complaint, The National Refining Company (Whitman), with the advice of its general counsel, was constrained to abandon further defense in the Kansas case and to capitulate. Within a month following the filing of said Amendment there occurred negotiations between National and Universal which culminated in the dismissal of the Kansas case and the acceptance by National of a patent license from Universal dated as of April 1, 1937. National has paid or incurred liability to Universal for royalties in excess of one million dollars.

In April 1939, Root entered a settlement agreement with Universal by the terms of which (a) Root took a license from Universal substantially in the standard printed

form used by Universal, and the form accepted by The National Refining Company and (b) the two infringement suits against Root, still pending in the Delaware District Court were to remain unaffected, and neither party should take any further action therein of any kind or nature, without the written consent of the other.

In June 1941 the attorneys, whose representation of Root had ceased because of Root's settlement with Universal but who were still representing several other oil companies yet in litigation with Universal and against whom *res adjudicata* had been asserted, appeared before the Third Circuit Court of Appeals, with notice to Universal, and before five judges then sitting made a showing of facts which strongly suggested that the judgment rendered by that court June 26, 1935 might have been obtained through the corruption of a member of the court by Universal through the enlisted agency of one or more of its attorneys. The Court of Appeals requested the attorneys to act as *amici curiae* and to present a formal petition embodying the charge. That was done, Universal appearing for the purpose of denying the charge and protesting the power and right of the court to take any action destructive of its rights under the judgment.

The theme of Universal's argument was that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

The court appointed a Special Master with authority "to examine, investigate, to make and report to this court his findings and conclusions concerning the relationship and dealings, if any, between Universal Oil Products Company, Morgan S. Kaufman and former Circuit Judge Warren Davis * * * and in particular whether there was in connection with the prosecution and disposition of said

causes such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgment rendered by this court'' in the Root case on June 26, 1935.

The Special Master himself examined records, documents and other evidence in the possession of the Department of Justice, proceedings before the grand juries in New York and Philadelphia, and then held extended *inter partes* hearings, concluding with thousands of pages of sworn testimony and hundreds of exhibits. In October 1943, he submitted his report and his conclusions to the effect that there was a corrupt and illicit conspiracy between Circuit Judge J. Warren Davis and Morgan S. Kaufman, who was Universal's attorney, and that when Universal agreed to pay him a substantial fee it knew that he would use the money, or the prospect of receiving it, in some way to influence Judge Davis. He concluded that there was in connection with this case such fraud as tainted and invalidated the judgments rendered by the Court of Appeals on June 26, 1935. Exceptions and extensive briefs were filed and the case fully argued before the Third Circuit Court of Appeals, five judges again sitting.

For the second time Universal pressed its argument that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

On June 15, 1944 the said court entered an order in this case adopting the Master's findings and conclusions and *vacating its judgment entered on June 26, 1935,* recalling its mandates issued October 30, 1935, and directing the Clerk *to restore the causes to the argument list for reargument.* No review of that order by the Supreme Court was ever requested.

Meanwhile, on May 29, 1944, the Supreme Court handed down its decision in the case of the *Universal Oil Products Company vs. Globe Oil & Refining Company* (322 U. S. 471), in which it held the Egloff patent invalid and the Dubbs patent not infringed by the Winkler-Koch process.

Within a month following the order of the Third Circuit Court of Appeals (July 28, 1944), and with reargument of the whole case thus imminent, Universal fled to the Root Refining Company for help and entered into a second "settlement agreement" with it. The new settlement agreement recited the order of the Third Circuit Court of Appeals directing a reargument and then stated that "neither party desires to continue such litigation" and in consideration of the repayment by Universal to Root of $32,298.38 and a royalty-free license for the future, the parties agree that "the decree of the District Court of Delaware shall be vacated, the Bills of Complaint dismissed and that either party may do whatever is necessary" to effect the foregoing without further notice to the other. Thus "empowered" by Root, Universal did file in the Delaware District Court motions to dismiss the two infringement suits. However, the District Court, after full argument, has deferred ruling on the dismissal motions pending the disposition of these proceedings in the Third Circuit Court of Appeals.

Though $32,298.38, and a royalty-free license, was all the recited consideration which Root was paid, there was much more which was *not* disclosed by the written agreement. Over the strenuous, almost tearful, objection of Universal at the trial just completed, it was elicited that Universal also paid Root (by abating accrued royalties) the sum of $374,221.25. That concealed payment, added to what the contract revealed, $32,298.38, made a total payment of $406,619.63. Thus almost half a million dollars is the confessed value to Universal of Root's waiver of reargument and Universal's hope to escape the conse-

quences of its fraud by a dismissal of the case,—and thus "non-suit" the Third Circuit Court of Appeals. The advantage which Universal hoped to gain by that ill-advised chicanery is fully revealed by the argument, repeated by Universal *ad nauseam* that "there is no case or controversy, with adverse parties upon which could be constitutionally predicated any jurisdiction of the Third Circuit Court of Appeals, to destroy Universal's property right in its judgment of 1935"—no matter how convincing was the evidence that such judgment had been procured by its own treachery.

In December 1944, the Third Circuit Court of Appeals, upon the application of its *amici curiae*, entered an order allowing to them the sum of $100,000 as compensation for their services and $54,606.57 as expenses and directing that the aggregate sum of $154,606.57 together with costs in the Circuit Court of Appeals be taxed against Universal.

In February 1945, Universal filed in the Supreme Court a "Motion for Leave to File a Petition for a Writ of Prohibition and a Writ of Mandamus" and "Petition for a Writ of Prohibition and a Writ of Mandamus." The prayer was that a writ of prohibition issue out of this Court to the Honorable John Biggs, Jr. (*et al.*, Circuit Judges of the Third Circuit Court of Appeals) prohibiting said judges and the said court (a) from asserting or exercising, upon the application of *amici*, any jurisdiction over the petitioner in a cause entitled *Root Refining Company, Defendant-Appellant vs. Universal Oil Products Company, Plaintiff-Appellee;* (b) from entering or enforcing any order, decree or judgment therein binding or purporting to bind the petitioner; and (c) from entertaining jurisdiction with respect to order directing that the expenses, costs and disbursements, including counsel fees to said *amicus curiae*, be taxed against the petitioner. There was included a prayer that a writ of mandamus be issued out of this Court directing and commanding the respondents, judges of the Third Circuit Court of Appeals, to vacate

two certain orders dated June 15, 1944 and December 29, 1944, purported to have been entered by the respondents against petitioner in the said entitled causes and to enter an order dismissing the application of the *amici curiae* for expenses, costs, disbursements and counsel fees. The predicate of said motions by Universal was that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

On March 5, 1945 this Court denied the motions (324 U. S. 826) and on March 12, 1945 denied a rehearing on the motion.

On April 23, 1945 Universal's petition to this Court (under Judicial Code Sec. 262) for writ of certiorari to the Third Circuit Court of Appeals was denied but its petition under favor of Judicial Code Sec. 240(a) was granted. This brought up for review only the order of the Third Circuit Court of Appeals granting fees and expenses of *amici curiae* and the Special Master. Universal had two arguments; it contended that such order was based upon a mere investigation in which the fundamental rules of evidence were, at the court's direction, wholly disregarded, thus depriving petitioner of some of the safeguards of adversary proceedings and of its property without due process of law.

Also, for the fourth time (and the second time before this Court), Universal argued that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

This Court in the case of *Universal Oil Products Company vs. Root Refining Company* (328 U. S. 575, June 10, 1946) reversed the challenged order of the Third Circuit

Court of Appeals with respect to *amici* fees and expenses. The opinion, written by Justice Frankfurter (and to be quoted hereinafter) ignored Universal's repeated argument and fully recognized the inherent power of the court to investigate a fraudulently obtained judgment—"and to unearth it effectively." However, the Court concluded that a trial by a master who was authorized by the court to make, and who did make, investigations and examinations of facts and records on his own initiative, though in addition to *inter partes* hearings, did truly lack some of the safeguards of adversary proceedings; that in such a situation it was not just to assess the fees and expenses of their attorneys in conducting an investigation where petitioner throughout objected to the character of the investigation if it was to be used as a basis for adjudicating rights. The Court also held that in any event compensation is not the normal reward of those who offer services as *amicus curiae*, especially since the *amici* had already been compensated by private clients whose interests they were furthering; the opinion also added that a federal court can always call on law officers of the United States to serve as *amici*. Rehearing was denied October 14, 1946.

The case coming back to the Third Circuit Court of Appeals in this posture, suggestions of further procedure, though of widely divergent character, were made by all the counsel involved. In fact a new one appeared, in behalf of Skelly Oil Company, which filed a motion to intervene to which was attached a complaint or petition. On December 19, 1946 the court (five Circuit Judges again sitting) held an extended formal hearing, with all counsel present, to receive and consider arguments on the suggestions made and as to the grounds for dismissal of the Root case and the intervention motion of Skelly Oil Company.

At that hearing counsel for Universal argued (for the fifth time) that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only,

had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

Since July of 1944, when National Refining Company learned of the June 15, 1944 order of the Third Circuit Court of Appeals (which vacated the judgment of 1935), royalties accruing to Universal under the license agreement between them were withheld by National. National deferred legal action pending the outcome of the review proceedings in this Court. After this Court's opinion of June 10, 1946 (328 U. S. 575) National (the name had by that time been changed to Whitman) conducted unsuccessful settlement negotiations with Universal and then on December 29, 1946, Whitman filed its complaint against Universal in the District Court of Delaware.

In said complaint Whitman averred in substance that it had been coerced into abandoning its defense in the Kansas case and into a license agreement with Universal by the latter's use of the judgment rendered by the Third Circuit Court of Appeals, June 26, 1935; that said judgment had been obtained in a corrupt and fraudulent manner as found by the Special Master and as confirmed by the Third Circuit Court of Appeals by its vacation of such judgment. Whitman also charged that Universal had given more favorable royalty rates to Root Refining Company (by the 1944 agreement above-mentioned) and that by the terms of National's agreement with Universal it was entitled to equal treatment. The complaint closed with prayer for alternative relief, rescission of the license agreement, return of royalties and restoration to *status quo ante*, or the more favorable royalty rates as averred. No answer has yet been filed by Universal and the case is still pending, its activities suspended until the conclusion of these proceedings.

On June 20, 1947 the Third Circuit Court of Appeals entered an order granting the intervention motion of Skelly

Oil Company* and (a) setting aside and vacating the judgment of that court entered on June 15, 1944, which in turn had set aside that court's original judgment in the *Root* case June 26, 1935, and (b) ordering "Universal Oil Products Company to appear and show cause, if any there be, why the said judgment of this court entered on June 26, 1935 should not be set aside and vacated by reason of alleged fraud and corruption practiced upon that court by Universal Oil Products Company or those acting in its behalf," and (c) authorizing the Attorney General of the United States or some member of the staff of the Department of Justice to appear as *amicus curiae*.

There followed a series of protests to this Court by Universal Oil Products Company. In September 1947, counsel for Universal filed in this Court (a) a motion for leave to file a petition for writs of certiorari, and petition (with brief); (b) petition for writ of certiorari (with brief); (c) motion for leave to file a petition for writ of prohibition (with brief); (d) motion for leave to file a petition for writ of mandamus (with brief).

In each one of the proceedings thus brought before this Court, Universal for the sixth time (and the third time before this Court) urged that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

At that time counsel for Whitman (National) conceiving that injustice could result from the misrepresentation made by counsel for Universal in stating to this Court that "none of the other oil companies sued in other courts by petitioner for infringement of the same patents could have

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* Universal later settled its controversy with Skelly and Skelly was permitted by the Third Circuit Court of Appeals to withdraw prior to trial and has no further part in these proceedings.

a further interest in this case," asked leave of this Court to file an *amicus curiae* memorandum. In that memorandum such counsel summarized some of the facts hereinabove related and showed how the fraudulent judgment had in fact been used to coerce National into a license agreement under which Universal had received almost a million dollars in royalty; in that same memorandum said *amicus* announced the intention of Whitman to file an intervention motion in the forthcoming retrial of the fraud case in the Third Circuit Court of Appeals.

On November 10, 1947 this Court denied all of the motions and petitions of Universal, but granted the request to permit the filing of the *amicus curiae* memorandum.

On January 16, 1948 the Chief Justice of the United States issued an order relieving the judges of the Third Circuit Court of Appeals of further consideration of this case (and the companion case *American Safety Table Company vs. Singer Sewing Machine Company*) and appointed the Honorable E. Barrett Prettyman, the Honorable John C. Mahoney and the Honorable Morris A. Soper, respectively of the Court of Appeals of the District of Columbia, the First Circuit and the Fourth Circuit, to act as Circuit Judges of the Third Circuit "and discharge all of the official duties of the Circuit Judges thereof in connection with the following cases: *Root Refining Company vs. Universal Oil Products Company*, No. 5546—*Root Refining Company vs. Universal Oil Products Company*, No. 5648—and *American Safety Table Company vs. Singer Sewing Machine Company*, No. 6459, such designation and assignment to be for the period required to enable the said designated and assigned judges to dispose of said cases."

On January 22, 1948 the Circuit Judges so designated held a hearing somewhat of an organizational nature, at which were present counsel for Universal, for Skelly (still in the case at that time), for Whitman (which had by then filed a formal motion for intervention) and *amicus curiae* of the Department of Justice. At that hearing questions of

law and procedure were propounded and counsel advised to submit briefs, new and responsive pleadings, which was done in the ensuing several weeks.

Counsel for Universal filed a printed brief upon its favorite theme (the seventh time) that there was no case or controversy pending and no adverse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

On March 23, 1948 a formal hearing was had and oral arguments permitted in elaboration of the printed briefs. The court also then presented to counsel for suggestions, criticisms and objections a preliminary draft of a proposed court order gathering together the essential judicial history of the case, the charges made before the court by factual averments of *amicus curiae* and Whitman, then presented, and ultimate questions of fact for determination. The court also then granted Skelly Oil Company leave to withdraw from the case, and granted the intervention motion of William Whitman Company, Inc.

At that same hearing the court considered the trial of a companion patent case, *American Safety Table Company vs. Singer Sewing Machine Company,* in which there had been made charges of corruption of the same Judge Davis of the Third Circuit Court of Appeals by the same attorney, Morgan S. Kaufman, who had been retained by the American Safety Table Company. It developed that proof in that case of the continued fraudulent conspiracy between the same judge and the same attorney would involve the presentation of the same evidence to be adduced in the *Universal* case. Whereupon, and after full discussion and the concurrence of all counsel, the court tentatively ordered the trial of the charges to be consolidated to the following extent only: the evidence in the *Universal* case should first be taken and counsel for both American Safety Table Company and Singer Sewing Machine Com-

pany be granted the privilege to cross-examine the witnesses and that said testimony when completed should be stipulated and accepted by such counsel as testimony to be considered in the *American Safety Table* case with whatever additional testimony either party thereto might offer. (Ultimately the *Universal* case required ten full trial days and the *American Safety Table* case less than one.) The tentative order was issued as a final one on April 6, 1948 and it was further ordered that trial commence at Philadelphia on May 10, 1948 before the court itself and without the intervention of a master or referee. The said final order of April 6, 1948 contained the following summation:

> "It is further ordered that in view of the report of the special master and the allegations of wrong-doing set forth by the United States as *amicus curiae* and by the William Whitman Company the court deems it necessary to determine whether J. Warren Davis, a member of this court, was improperly influenced in his action in these cases by the hope of gain or reward, and whether the judgment of this court in these cases was secured by fraud or wrong-doing on the part of Universal Oil Products Company or any one acting in its behalf, and to that end sets forth the charges that have been made and are to be tried as follows:
>
> (a) Whether Judge J. Warren Davis' action in these cases was influenced by the expectation of gain or favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman.
>
> (b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of $10,000 to one Charles Stokley, a cousin of Judge Davis, were the means whereby Judge Davis was compensated in whole or in part for his decision favorable to Universal Oil Products Company in these cases, and whether certain other transactions between Judge Davis and Morgan S. Kaufman during the period 1935 to 1938 allegedly related to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice.

(c) Whether Morgan S. Kaufman was employed or retained by Universal Oil Products Company in connection with these cases and, if so, whether the purpose of such employment or retainer was the expectation of Universal Oil Products Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with these cases.

It is further ordered that the motions and response filed herein by Universal be accepted as a general denial of all allegations of wrong-doing above set out with leave to file an additional answer if it so desires on or before April 15, 1948.

And it is further ordered that in the trial of these charges the *amicus curiae* shall have the duty to present to the court the available evidence bearing upon the charges, whether or not it supports the charges, to the end that the truth may be ascertained, and that Whitman and Universal shall have full opportunity to present evidence bearing on the charges and to participate in the examination and cross-examination of witnesses and in the argument before the court, so that the customary procedure of an adversary proceeding may be observed."

Trial proceeded before the specially constituted Third Circuit Court of Appeals as ordered, beginning May 10, 1948 and ending May 31. During that period the Circuit Court of Appeals listened to the testimony of fifty witnesses, produced in chief by *amicus curiae*, but with full opportunity of cross-examination by counsel for all of the parties; it received and examined over three hundred exhibits aggregating thousands of printed pages; it listened for two full days to unrestricted arguments and summations by all counsel desiring to be heard.

On July 6, 1948 the Circuit Court handed down a seventy-one page Summary of Evidence and a fifty-four page Opinion (169 Fed. 2d, 514). The unanimous conclusion of the three Circuit Judges was that Universal Oil Products Company hired attorney Morgan S. Kaufman, and paid

him the sum of $50,000, in the expectation and for the purpose of having him improperly influence former Circuit Judge J. Warren Davis in the appeals of the cases of *Universal Oil Products Company vs. Root Refining Company* and that said Morgan S. Kaufman did improperly influence Judge Davis by means of a mortgage loan of $10,000 to Davis' cousin, C. L. Stokley of Mount Dora, Florida, which the court held was a sham "and a false front behind which the true nature of the payment was concealed." The court concluded its opinion:

> "The disposition now to be made of the *Root* case admits of no doubt. The records of the courts must be purged * * *. The judgment of the court is that the mandates in the *Root* cases be recalled, that the judgments of this court therein be vacated and that the cases be remanded to the district court with directions to vacate its judgments therein and dismiss the suits by reason of the fraud practiced upon this court."

The Circuit Court directed the costs of the proceeding in respect of both the *Universal Oil Products-Root* cases and the *American Safety Table-Singer* case to be paid four-fifths by Universal and one-fifth by American Safety Table. The Circuit Court eliminated all counsel fees and expenses as assessable costs and reduced the computation to figures which, in view of the scandalous fraud perpetrated by Universal upon other litigants and the court itself, might by other courts be deemed grossly inadequate. Under the court's order and the cost bills as filed, Universal is required to pay $5,432.23. If the court had not so proportioned the costs and had ordered Universal simply to pay five-fifths of its own cases, Universal would have been assessed $5,076.54. Thus the complaint to this Court of the harshness of the actual assessment is with respect to the difference between $5,432.23 and $5,076.54, or $355.69.

Now, for the eighth time (and the fourth time before this Court) Universal repeats its monotonous argument that there was no case or controversy pending and no ad-

verse parties; that the Circuit Court of Appeals, a statutory court with appellate jurisdiction only, had no jurisdiction or judicial power to set aside the judgment it had granted to Universal, no matter if it was fraudulently begotten.

ARGUMENT.

The case has in truth had a long judicial history, but a large part of it has been caused by Universal's obstinate refusal to accept the rulings of this Court. The decisions of this Court, not only applicable to this case, but in this case, cannot possibly be misunderstood.

In 1944 the Supreme Court decided the case of *Hazel-Atlas Glass Company vs. Hartford-Empire Company,* 322 U. S. 238 (and a companion case, *Shawkee Glass Company vs. Hartford-Empire Company,* 322 U. S. 271). The facts of the *Hazel-Atlas* case were very much like those of the case at bar except that there the corruption was not of the court itself but the mere use in a Circuit Court of fraudulent evidence, which, if there are degrees of fraud, is certainly less heinous than the bribery of a Circuit Court judge. On May 5, 1932 the Third Circuit Court of Appeals, holding that Hartford-Empire Company's patent was valid and infringed, reversed a district court judgment and directed that court to enter a decree accordingly, which was done. Shortly thereafter the defeated defendant paid one million dollars to Hartford and took a patent license. Nine years later facts were unearthed showing that Hartford had emphasized spurious evidence before the Third Circuit Court in 1932 which was relied upon by that court in reaching its judgment. Hazel-Atlas filed in that court a petition for leave to file a bill of review in the district court; however, since the effectual fraud was on the Circuit Court and not on the lower court, the Circuit Court concluded to hear and determine the charge itself.

In a review of the case the Supreme Court recited in its opinion, written by Justice Black, that the court-made

rule of term though a salutary one, must yield to a paramount equitable need for relief against a fraudulently procured judgment regardless of its term of entry; that when occasion demanded, where enforcement of judgments is manifestly unconscionable, courts have wielded their inherent power of devitalizing them without hesitation; that while the procedure of a bill of review is traditional, yet nothing within reason or precedent requires such a cumbersome and dilatory procedure; that on the indisputable record of the case, the Circuit Court had both the duty and the power to vacate its own judgment and to give the district court appropriate directions. It had been charged (and so held by the Circuit Court) that the defrauded defendant Hazel-Atlas Glass Company had not exercised "proper diligence in uncovering the fraud" and that this should stand in the way of its relief. In rejecting that argument this Court said, at page 246:

> "But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. *Mercoid Corporation v. Mid-Continent Investment Co.*, 320 U. S. 661; *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

This Court ordered the Circuit Court to set aside its judgment of 1932, to recall the mandate and issue a new one to the district court directing it to reinstate its original judg-

ment denying relief to Hartford, and to take such additional action as may be necessary and appropriate, including dismissal of the case under the holding in *Keystone Driller Co. vs. Excavator Co.*, 290 U. S. 240.

In the companion case of *Shawkee Manufacturing Company vs. Hartford-Empire Company* (322 U. S. 271, 1944), this Court held that Shawkee Manufacturing Company, another alleged infringer and against whom Hartford had successfully used its judgment fraudulently begotten in the *Hazel-Atlas* case, was also entitled to be freed from obligations under the judgment rendered against it; also that Shawkee be permitted to proceed in the district court to prosecute its claim for an accounting against Hartford-Empire for Shawkee's costs in these and former proceedings, for moneys paid by them to Hartford and for damages sustained by it because of Hartford's unlawful use of the patent.

The *Hazel-Atlas* case, decided by this Court at the very time (1944) the Special Master in the first trial of this Universal-Root case was making his report to the Third Circuit Court and at the threshold of the procedural questions raised thereby, was a complete solution of a major problem. It was clearly indicated by this Court that it was the *duty* of the Third Circuit Court of Appeals and *within its inherent power*, though an appellate tribunal, to vacate its own judgment if procured by fraud and to that end need not refer the issue to a district court but could itself determine the fact. It was further established that the duty to do so was not dependent upon an adversary's aggressiveness

> "for the matter does not concern only private parties. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant and the preservation of the integrity of the judicial process must not always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not

> so impotent that they must be mute and helpless victims of deception and fraud." (322 U. S. 246)

If a court's inherent power to undo a wrong to *it* and to the public welfare is not defeated by mere lack of diligence of litigants, *a fortiori* a court is not sterilized nor divested of its paramount power by silly contrivances of the guilty party who pays his adversary to remain listless and indifferent. When Universal, within a month after it first faced the consequences of the confirmation of its fraud, paid Root over four hundred thousand dollars to waive reargument and to secure its permission to dismiss the case (and thus hopefully cut the ground out from under the Third Circuit Court of Appeals), it did what was perilously close to a continuation of the initial fraud. Clearly it showed an intent to preserve the fruits of its fraud and to escape retribution at the hands of its victims; equally clearly that conduct makes a mockery of its bland assurances hereinbefore made: "We welcome such an investigation; we will cooperate to the extent of our abilities and wish to have the investigation as wide as possible"—just so long, however, as its fraudulent judgment and the fruits thereof are preserved and free from peril.

When evidence is presented that a judgment of a federal tribunal was procured by fraud, bribery and corruption, there is no need or requirement for a "pending" case to give birth to power. Be that federal tribunal a nisi prius court, an appellate court or the Supreme Court, inherent, though latent, judicial power is merely fertilized by discovery of fraud and there arises at once a duty to unearth it, to vitiate a fraudulent judgment and to clear the records of the stigma. There always is *a case*—that in which the judgment was rendered. In the case at bar there was, and always has been throughout these dismal proceedings, a patent case, *Universal Oil Products Company vs. Root Refining Company*. True, the term of court is over; the tarnished judgment still stands on the records. True also, the controversy has changed—from the issue of

validity and infringement of a patent, to an issue of fraud in securing a judgment; but the case is the same. Even the active adversaries have changed; Universal has lured Root from the arena but all its gold is powerless to circumvent the public interest, nor could any of its devices or cunning reduce the court to impotence.

In the exercise of its inherent power to undo a wrong, a court may not commit another wrong by denying to one accused of even this shameful fraud, the usual safeguards of adversary proceedings.

This Court made that clear in its review of one phase of this very case in 1946 when it held that fees of *amici curiae* cannot justly be assessed against an accused in a proceeding where such safeguards were overlooked by a master who procured and considered evidence dehors the record and in the absence of the parties and their counsel. Yet in that review counsel for Universal made the same argument that is now made, that the Court of Appeals has no power originally to adjudicate questions of disputed fact; that there was no case or controversy and no adversary party as required by the Constitution, and that the Court of Appeals lacked jurisdiction in the premises. (Even that was not the first time Universal made that argument to this Court. The first time it was made, this Court rejected the relief requested, prohibition and mandamus.) Now, the second time in 1946, this Court not only rejected the argument with relation to *amici* fees, but said (Justice Frankfurter's opinion, 328 U. S. 575):

> "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U. S. 238. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversarry proceedings must be observed.

> No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." (P. 580)

That opinion *in this case*, together with the *Hazel-Atlas* and the *Shawkee* cases, *supra*, put an end to the argument —for all but Universal. When the Third Circuit Court of Appeals accepted the implied procedural criticism of this Court by vacating the order which had vacated the original judgment, but evidenced its intention inexorably to pursue the matter to its end by a new trial (this time with all the safeguards observed) Universal again filed multiple appeals to this Court to stop the proceeding. Again it argued, as it did before and as it does now, and again it suffered the rebuff of this Court. When the new Circuit Court, especially created for the pending retrial by the Chief Justice of the United States, convened, Universal reiterated its tattered refrain but this Court will notice that the lower court devoted several pages of its opinion to a temperate and patient refutation of the argument.

It is conceded by Universal that there is no right to a review, that review is a matter of grace. The possibility and imminence of a review does have a restraining influence upon a lower court and, of course, that wholesome influence was present and effective during the procedure of the specially constituted Circuit Court of Appeals.

The improbability of error in the ultimate conclusions of fact is demonstrated by the history of this case. First, on a record possibly (though not actually) discolored because of the Master's outside investigations, the regular Third Circuit Court of Appeals unanimously concluded that Universal was guilty of bribing a former member of that court. It will have been noted that in all of the hearings involved at that time not three but five circuit judges

sat—so gravely was the matter regarded. Second, in the retrial, and with this Court's admonition to observe all the safeguards of adversary proceeding in front of it, the members of a specially constituted Circuit Court drawn by the Chief Justice from distant areas, unanimously reached the same conclusion of guilt. This time there was not even a master. The court sat with all the dignity of a United States Circuit Court of Appeals and through long and arduous days of trial personally listened to every syllable of testimony, personally ruled upon all objections (several times only after the interim filing of elaborate briefs), personally examined thousands of pages of documents and then patiently listened to days of arguments and summations from all parties.

Such a trial is probably without precedent in the history of our courts and were the record below ever examined by this Court, it would be found that the lower court leaned backward in safeguarding "rights of Universal." In effect Universal had a review; the second court retried the case, though the review took the form of most carefully and critically listening to the evidence *de novo*, and with this Court's admonition in mind at all times. In all practical effect Universal has been (civilly) found guilty of bribing a judge of the second highest tribunal in the country by the unanimous conclusion of eight Circuit Judges, and if we add the Special Master, there are nine such opinions; there is not one dissent.

Intervention of
William Whitman Company, Inc.

In the former opinion in this case (328 U. S. 575, Justice Frankfurter), it was said:

> "The power to unearth such a fraud is the power to unearth it effectively. *Accordingly a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation.*" (Italics supplied.)

If a federal court may *sua sponte* bring before it by appropriate means all those who may be affected by a decision, *a fortiori,* it may grant a motion to intervene, if it is persuaded that the intervenor *may* be affected.

The foregoing recital of facts very clearly shows that Whitman (National) not only may be but is vitally affected. There is now pending in the Delaware District Court an action in which Whitman avers: that it was constrained to abandon its defense of a patent infringement suit (and the probable success of its defense is evidenced by this Court's later holding in the *Globe* case, *supra,* that the Egloff patent was invalid and the Dubbs patent not infringed by the Winkler-Koch process); that the coercion used by Universal was its plea of *res adjudicata* in that National, as a member of the Patent Company, was in legal effect a party to this case now at bar and that it was represented therein by Root Refining Company and that it was *bound* by the 1935 judgment of the Third Circuit Court of Appeals and that thus National had had its day in court and was legally unable to defend further; that National was thus induced to accept a license and has paid large royalties to Universal. In said complaint National avers that the judgment so used to coerce it was fraudulently obtained by Universal's bribery of a member of the Third Circuit Court of Appeals. Answer admitting the fraud has not yet been filed by Universal.

Thus there is the *same issue* between Whitman and Universal in a pending case, review of which must be made by the Third Circuit Court of Appeals, the same court before which this case was pending—and which could not possibly reach divergent views upon the same evidence. To force the District Court to try the case originally and then review it, would be a nonsensical act by the Third Circuit Court of Appeals.

Furthermore, adopting Universal's own assertion in its averments against National in the Kansas case, National

(Whitman) *was* in legal effect an original party to this case; and if its representation by Root ceased because of Root's own settlement agreement with Universal, then National had the right to succeed its agent and protect its own rights when its representative would not and could not do so.

The Federal Rules of Civil Procedure are applicable to district courts, but they do embody and reflect traditional concepts of the rights of litigants and these (as Universal itself argues for its own interests) are certainly applicable to the present situation. Rule 24 of said Federal Rules of Civil Procedure provides:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.
>
> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Whitman's motion to intervene should be granted under either one of the above sections, the one as of right and the other at the court's discretion.

As the case now stands, considerable duplicative judicial labor has been saved and cumbersome procedure avoided. It is now clearly *res adjudicata* between Whitman and Universal that the latter's 1935 judgment, used to coerce National into a costly license agreement, was fraudulently and corruptly obtained by Universal. Whatever legal damages have been suffered by National by reason of such fraud, and whatever punitive damages should be suffered by Universal, are yet to be ascertained—and they will be in a proper judicial forum.

Costs.

Universal has little to complain in the matter of costs—$355.69. Indeed, if there is any error in the record it is the lower court's order which operated to shield Universal from the large costs ordinarily flowing from its heinous conduct (the *Hazel-Atlas* and the *Shawkee* cases, *supra*). It might well be thought that a court having just convicted Universal of an offense most odious to judicial integrity would have had little sympathy for the culprit and would have been eager to save the victims of the fraud from further loss. On the contrary, not only did the lower court force the victims to absorb further loss, but went out of its way to attempt permanently to bar them from recovering those losses as damages flowing from Universal's fraud. Only "taxable" costs were assessed against Universal, and these were so restricted as to exclude thousands of dollars of actual trial expense; even printers' bills paid in full by the defrauded victims were discounted in favor of the offender.

No counsel fees or expenses were allowed for either *amicus curiae* or for Whitman. Indeed, though *amicus* presented a bill therefor, Whitman did not. (The reason Whit-

man concluded not to submit a bill for its counsel fees was that it is yet to be determined in its pending Delaware or other case that National was entitled to rescission of the contract or damages; that issue was not before the lower court in this case and if fees were awarded it might be a premature adjudication of Whitman's right to damages.) Though the issue was thus not before it, nevertheless, the lower court (Judge Mahoney not then participating) reached out to adjudicate it anyhow and "held" that even if Whitman had submitted a bill for fees, the request would have been denied; it even went so far as to attempt to bar Whitman from ever recovering them as expenses even in a subsequent lawsuit to recoup its losses from Universal's fraud.

The court was obviously impressed by the *pro bono publico* aspect of the case and lost sight of the fact that by its own permission there was also in front of it a private litigant with a personal grievance against Universal and whose litigation expenses were just another item of the damages to be recovered from its defrauding adversary, in no degree dependent upon its "contribution" to the cause of the court. The court also lost sight of the remark by Justice Frankfurter—in this case—

> "No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' the court may assess counsel fees as part of the taxable costs." (328 U. S. at page 580)

The lower court's failure to perceive the justice and equity in that remark by Justice Frankfurter has led it into the anomalous result that the interest of the public and the dignity of a United States Circuit Court of Appeals, both outraged by felonious bribery, are fully appeased by cancelling a judgment—at the expense of those who suffered

most by it—and that the mollified hand of the court should be extended to shield the briber from the monetary consequences of its fraud.

Now Universal complains that by reason of the court's order—four-fifths and one-fifth—it must pay as "costs" $5,432.23 instead of $5,076.54, a difference of $355.69.

CONCLUSION.

It is not deemed necessary to answer at any length the remaining errors assigned by Universal.

Universal suggests that its judgment has been taken from it without due process of law. Certainly it was *obtained* by it that way though Universal does not dwell on that fact. As is usually the case with those who defy our laws or sully our judicial processes or transgress the constitutional rights of others, Universal is loud in its assertion of its own constitutional rights. Universal, outcast though it be, is entitled to minimum constitutional safeguards, but no more; these, at least, it has received. The easy availability of multiple judicial processes lends itself to the abuses which the history of this case so clearly reveals. Universal's resort to repeated petitions for writs of *certiorari,* repeated applications to file petitions in mandamus, and again in prohibition, has degenerated into mere legal showmanship and the time has come when this Court can put a period to this surfeit of legal expedients.

With solemn face Universal places before this Court no less than thirty-six allegations of "error" though strangely enough Universal's real complaint is not emphasized—that its fraud was discovered, that it has lost what it paid a court to grant and, most bitter of all, that it now stands naked and exposed to financial retribution for its crime. The objective of these legalistic "errors" is not sincerely to right a wrong to Universal. They are mere tentacles stretched forth in the hope that in their multitude

may be found one to lure the Court into a review of this case.

It is submitted that the petition of Universal for writ of *certiorari* to this Court should be denied.

Respectfully submitted,

LESLIE NICHOLS,

Attorney for Intervenor-Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 439, 440

UNIVERSAL OIL PRODUCTS COMPANY, *Petitioner*,

v.

ROOT REFINING COMPANY, ET AL.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION[1]

OPINION BELOW

The opinion of the Court of Appeals for the

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[1] The United States, although designated as *amicus curiae*, was more than merely *amicus* in these cases. The court below authorized the appearance of the United States as *amicus* by its order of June 20, 1947, in accordance with this Court's comment in its prior opinion in these cases (328 U. S. 575, 581) that "a federal court can always call in law officers of the U. S. to serve as *amici*." In the court below, the Department of Justice was charged with the duty of presenting "the available evidence bearing upon the charges, whether or not it supports the charges, to the end that the truth may be ascertained." (App. to Pet. p. xii). See *infra*, p. 8.

Third Circuit (Op. 1-41)[2] is reported at 169 F. 2d 514.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered July 6, 1948 (App. to Pet. xiv). The time for filing petition for writs of certiorari was extended on September 9, 1948, by Justice Burton to and including December 1, 1948. The petition for writs of certiorari was filed on December 1, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the exercise of its inherent power to protect the integrity of its judgments, a court of appeals has jurisdiction, notwithstanding the losing party's refusal to participate and the expiration or subsequent invalidation of the patents involved (a) to institute an inquiry into whether its judgments had been procured by fraud, (b) to hear the evidence, and (c) upon finding that the judgments

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[2] The pertinent record in these cases consists of more than 2,500 typewritten pages of testimony and over 300 exhibits, containing approximately 1,000 additional pages. Simultaneously with its petition, petitioner has filed a motion to dispense with the printing of the entire record for the purpose of the petition for writs of certiorari. The Government does not oppose the motion for the purposes of the petition. It is, however, filing herewith for the Court's convenience printed copies of the opinion below, in which the court dealt with these cases along with *American Safety Table Co.* v. *Singer Sewing Machine Co.*, a companion case also pending on petition for writ of certiorari (No. 441, this Term). Opinion references will appear as (Op. —) with the appropriate page number inserted.

were so tainted, to direct their vacation and the dismissal of the complaints.

2. Whether the evidence here supported the court's findings that the petitioner, Universal Oil Products Company, employed Morgan S. Kaufman improperly to influence the actions of Judge J. Warren Davis, formerly a judge of the Circuit Court of Appeals for the Third Circuit, in these cases, and that Judge Davis was so influenced.

STATEMENT

The instant petition for writs of certiorari seeks to bring these cases before this Court for the third time. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575; *Universal Oil Products Co.* v. *Root Refining Co.*, Nos. 352-353, Nos. 102-103 Misc., October Term, 1947, denied 332 U. S. 813.

In 1929 and 1931, Universal Oil Products Company (Universal) brought suits for patent infringement against the Root Refining Company (Root). The suits were consolidated and the patents held valid and infringed. 6 F. Supp. 763. The Circuit of Appeals for the Third Circuit, affirmed on June 26, 1935, in an opinion written by Judge J. Warren Davis (78 F. 2d 991), and this Court denied certiorari, 296 U. S. 626. In 1939, Universal and Root arrived at an agreement settling their controversy.[3]

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[3] On July 28, 1944, Universal and Root entered a further settlement agreement. (Nos. 352-353, October Term, 1947, R. 170).

On June 5, 1941, the attorneys who had represented Root and were then representing other oil companies against which petitioner had instituted similar infringement suits on the basis of the *Root* decree, suggested to the Circuit Court of Appeals for the Third Circuit that the testimony taken at Judge Davis' trial [4] pointed to his bribery by one Morgan S. Kaufman to obtain a decision favorable to Universal in the *Root* appeal and urged the court to inquire into the matter. At the suggestion of these attorneys, who had been appointed *amici curiae*, the court appointed a master to inquire into the circumstances surrounding the *Root* decree. The master held extensive hearings, which, however, were not governed by the customary rules of trial procedure.[5] At the conclusion of the hearing, he submitted a report concluding that the *Root* decrees were tainted and invalidated by fraud. The court similarly concluded, relying in part on this report, that the decrees were so tainted and by order dated

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[4] Judge Davis and Kaufman were tried in the District Court for the Eastern District of Pennsylvania in 1941 on an indictment charging obstruction of justice in regard to The Fox bankruptcy matters. See *infra* p. 26 fn. 28. The trial resulted in a disagreement of the jury. A second trial similarly resulted in a jury disagreement.

[5] The master examined records in the possession of the United States Attorney for the Southern District of New York, the records of proceedings before the Philadelphia grand jury, bank records and various statements of interested parties. From these materials he selected those documents which he deemed appropriate for the submission to the inspection of the *amici* and counsel for Universal.

June 15, 1944, directed that the judgments be vacated and the cases reargued. 62 U. S. P. Q. 114.[6] Subsequently, on December 29, 1944, the court awarded the master fees of $25,000 and at the *amici's* request, awarded them $54,606.57 as expenses and $100,000 as reasonable compensation. 147 F. 2d 259. On review, this Court set aside that part of the order of December 29 dealing with the *amici* as invalid on the ground, among others, that the order of June 15, 1944, upon which this order was based, deprived Universal of its judgments without proper hearings.[7] 328 U. S. 575.

On June 20, 1946, the court below invited suggestions from petitioners and the then *amici* as to the "present status of the appeals" in the *Root* case, "now that the petitions for writ of certiorari have been disposed of by the Supreme Court" (R. 3, Nos. 352-353, October Term, 1947). After the filing of briefs and oral hearing on the suggestions there submitted (R. 5-21, Nos. 352-353), the court on June 20, 1947, vacated its order of June 15, 1944, which had in turn vacated its original judgment of June 26, 1935, and directed Universal to show cause why

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[6] No effort was made to secure review of this order.

[7] The Court simultaneously dismissed the writ of certiorari invoked under Judicial Code 262, in which petitioners had questioned the jurisdiction of the court to enter the order because of the alleged absence of a justiciable controversy. 328 U. S. at 581. A petition for rehearing alleging ambiguity in the court's opinion was denied on October 14, 1946. 329 U. S. 823.

the original judgment should not be set aside by reason of alleged fraud.[8] (R. 174-177, Nos. 352-353). Universal's petitions and motions, seeking review of this order (Nos. 352-353, Nos. 102-103 Misc., October Term 1947) were denied. 332 U. S. 813.

Thereafter, the Senior Judge of the Third Circuit on December 26, 1947, certified to the Chief Justice in the language of 28 U. S. C. (1946 ed.) 17 a(b) (now 28 U. S. C. 291) that the judges of that court were unable to proceed in these cases. Chief Justice Vinson, on January 16, 1948, specially designated Judge Soper of the Fourth Circuit, Judge Mahoney of the First Circuit and Justice Prettyman of the Court of Appeals for the District of Columbia to act as circuit judges in the Third Circuit and discharge all the duties of circuit judges thereof in connection with these cases.

At a conference called by the specially designated judges on January 22, 1948, to discuss the posture of the cases, the attorneys were instructed to define what they understood to be the issues and merits as well as the questions of law involved (Op. 8). On February 10, 1948, Universal made return to the June 20, 1947, order to show cause and moved that it be dismissed on the ground that no justici-

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[8]The order further authorized the appearance of the Attorney General or members of the staff of the Department of Justice, as *amicus curiae*. Appearances of Department of Justice attorneys were thereafter entered (R. 180-181, Nos. 352-353), and the appearances of the former *amici* were withdrawn (R. 178-179, Nos. 352-353).

able controversy existed (Op. 8). On March 2, 1948, the Government filed a "Statement of Ultimate Facts" and charges of fraud, to which Universal filed a reply in opposition and a motion to strike (Op. 9). A hearing on these questions was held on March 23, 1948 (Op. 8). At this hearing the Court's proposed order, subsequently issued on April 6, 1948, was also read to enable counsel to object and criticize the provisions thereof.

On April 6, 1948, the court denied Universal's motions to dismiss the proceedings and to strike the Government's statement of ultimate facts.[9] The court ordered that in view of conclusions of the special master and the allegations of wrongdoing set forth by the United States, it deemed it necessary to determine whether Judge Davis was improperly influenced as a member of the court by hope of gain or reward and whether the judgment of the court was secured by fraud or wrongdoing of Universal or any one acting on Universal's behalf.[10] (Op.

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[9] The court also allowed William Whitman Company to intervene, and further granted the motion to withdraw of Skelly Oil Company, which had been allowed to intervene by the order of June 20, 1947 (*supra*, p. 5).

[10] The court formulated the charges which had been made by the Government and Whitman and which were to be tried as follows (Op. 9-10):

"(a) Whether Judge J. Warren Davis' action in these cases was influenced by the expectation of gain or favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman.

"(b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of

9-10.) Universal's motions and answers were accepted as a general denial of all allegations of wrongdoing. Trial of the cases was set for hearing without intervention of a master on May 10, 1948, and continuously thereafter until completed. The United States was charged at the trial with "the duty to present to the court the available evidence bearing upon the charges, whether or not in support thereof, to the end that the truth might be ascertained." All parties, including Universal, were to be given full opportunity to present evidence bearing on the charges and to participate in the examination and cross examination of witnesses and in the argument before the court "so that the customary procedure of an adversary proceeding might be observed." (Op. 10.) The trial was consolidated with that in *American Safety Table Co.* v. *Singer Sewing Machine Co.* as elsewhere de-

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$10,000 to one Charles Stokley, a cousin of Judge Davis, were the means whereby Judge Davis was compensated in whole or in part for his decision favorable to Universal Oil Products Company in these cases, and whether certain other transactions between Judge Davis and Morgan S. Kaufman during the period 1935 to 1938 allegedly relating to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice.

"(c) Whether Morgan S. Kaufman was employed or retained by Universal Oil Products Company in connection with these cases and, if so whether the purpose of such employment or retainer was the expectation of Universal Oil Products Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with these cases."

scribed (Br. of the United States in Opp. No. 441 this Term p. 5) (Op. 11).

The hearings took place in accordance with the terms of the order of April 6. The evidence was presented by United States as *amicus*. Full opportunity was accorded and availed of by Universal to examine and cross examine witnesses offered by the United States, and to offer witnesses on its own behalf. At the conclusion of the evidence, the cases were adjourned for a week for the preparation of arguments, which were heard without restriction as to time. (Op. 11). The court thereafter on July 6, 1948, issued its findings and opinion based on the evidence introduced at these hearings. The court found that Universal had retained Kaufman for the purpose of improperly influencing Davis' actions in these cases; that Davis' actions in these cases were improperly influenced by Kaufman, and that the so-called Stokley transactions, whereby Kaufman loaned money to Davis' cousin, Stokley, but Stokley paid the interest thereon to Davis, were the means by which Davis was compensated at least in part for his decisions. Accordingly, since the court also rejected Universal's contention that it was without jurisdiction to proceed in these cases, it ordered that the records of the courts be purged; that the original judgment in Universal's favor, both in that court and in the District Court be vacated and that the suits by Universal finally be dismissed by reason of the fraud practiced on the court (Op. 40-41).

ARGUMENT

In its prior opinion in these cases (328 U. S. 575), this Court indicated that the court below's order of June 15, 1944, directing the vacation of its original judgments was probably invalid since entered without according Universal the usual safeguards of an adversary proceeding. Accordingly, the court below vacated its order on June 15, 1944, and itself conducted another hearing. As a result of this hearing, that court again concluded that the original judgments were tainted by fraud, and hence directed their vacation and the dismissal of Universal's complaints for fraud. As to these proceedings, the usual safeguards of an adversary proceeding were fully observed.

The primary questions raised by Universal's petition here are factual in nature, although the various aspects of the court's findings of fact are only specified as error without discussion. The alleged jurisdictional infirmities in the proceedings below, which Universal's petition stresses,[11] have already been passed on and rejected as unsound by this Court in *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, and in its prior opinion in these cases (328 U. S. 575). See, also, this Court's denial of review in *Universal Oil Co.* v. *Root Refining Co.*, 332 U. S. 813. As to the factual questions, the find-

[11] Universal also questions the propriety of the court's action in permitting Whitman to intervene. The Government takes no position on this issue.

ings were made by a court comprised of judges who do not normally sit in the Third Circuit and who were specially designated by the Chief Justice to act in these cases. The findings are supported by ample evidence and are corroborated by the conclusions of the master and of the regular members of the Third Circuit, sitting *en banc,* which conclusions provided the basis for the court's order of June 15, 1944, in which it vacated its original judgments of June 26, 1935. There is, accordingly, no reason for this Court to review factual questions which of themselves do not warrant certiorari.

1. *Jurisdictional Contentions*: (a) Petitioner stresses at great length (Pet. pp. 44-60) that since Root, the named defendant, did not participate in these proceedings and the patents involved have expired or been held invalid (*Univrsal Oil Co.* v. *Globe Co.*, 322 U. S. 471), there was an absence of both adverse parties and a private controversy necessary for a "case or controversy" in the classical sense and hence that the court below was without jurisdiction to proceed in these cases. This contention has been urged upon this Court without success by petitioner in each of the two previous proceedings in these cases.

That contention was passed upon and rejected by this Court in its opinion in 328 U. S. It was the ground on which Universal sought review of the order allowing the expenses of the then *amici* under a writ of certiorari under Judicial Code 262. Al-

though that writ was initially granted (324 U. S. 839), the Court after further consideration dismissed the writ, while reversing the cause under the writ of certiorari invoked under Judicial Code 240 (a). 328 U. S. 575 at 581. The dismissal of the writ of certiorari under Judicial Code 262, viewed in light of the Court's statement that the inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question" (328 U. S. at 580), makes the rejection of this contention crystal clear. The citation of *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, in support of this statement serves further to demonstrate the unsoundness of Universal's position; in the *Hazel-Atlas* case, this Court pointed out (p. 246):

> This matter does not concern only private parties. There are issues of great moment to the public in a patent suit * * *. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an inquiry to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they

must always be mute and helpless victims of deception and fraud.

The same ground was the basis of Universal's subsequent effort by petitions for writs of certiorari under Judicial Code 262 and 240(a) and by motions for leave to file petitions for writs of mandamus or prohibition, to obtain review of the court's order of June 20, 1947, directing it to show cause why the original judgment should not be set aside for fraud. See, *e. g.*, Petition in No. 352-353, October Term, 1947, pp. 26-31. And although the Government there urged this Court to review the order if there were any question of the court's jurisdiction to proceed (Memorandum for United States as *amicus curiae*, in Nos. 352-353, October Term, 1947, pp. 11-12), this Court denied Universal's petitions and motions. 332 U. S. 813.

(b) Universal's contention that since the court below was an appellate court, it was without power itself to hear the evidence bearing on the fraud perpetrated upon it (Pet. pp. 36-44),[12] is likewise disposed of by the *Hazel-Atlas* case and this Court's prior opinion in 328 U. S. In the *Hazel-Atlas* case, it was held that the court of appeals there involved had the power itself to act in the premises. 322 U. S. at 249. Although in that case the evidence was

[12] It is to be noted that in the court below, petitioners did not object to this procedure when proposed by the court. See Hearing of March 23, 1948, before court below, p. 129, *supra* p. 7.

undisputed and was before the court on Hartford's sworn admissions, the Court's notation that it need not decide whether, if the facts were in dispute, the court of appeals "*should* have held hearings and decided the case or should have sent it to the District Court for decision" (italics supplied) (322 U. S. at 249-250, fn. 5) clearly indicates that even in such circumstances the court of appeals had the power to hold hearings, and whether, in fact, it should exercise that power in a particular case depended on the circumstances. See, also, the dissenting opinion of Mr. Justice Roberts (322 U. S. at 254). Similarly, in the prior proceedings in these cases, this Court, although it set aside the award of *amici's* expenses, did not upset the expenses of the master whom the court below had appointed as its agent to hear the evidence and submit a report, which the court adopted. Implicit in this approval of the master's expenses is the proposition that the court had power to appoint a master to hear the evidence,[13] and it follows that since the court could only delegate power which it had, the court itself could have heard the evidence.[14] Cf. *National Labor Relations Board* v.

[13] Universal's participation in the proceeding before the master with the knowledge that his expenses would be assessed by the court was, of course, insufficient alone to vest jurisdiction in the court to appoint a master.

[14] This conclusion is buttressed by the Court's comment: "The power to unearth * * * fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation." (328 U. S. at 580).

Rath Packing Co., 123 F. 2d 684 (C. C. A. 8). Thus, both the *Hazel-Atlas* case and this Court's prior opinion in 328 U. S. affirm the power of the court below, although an appellate court, itself to hear the evidence where the fraud alleged was practiced on it. See, also, *Art Metal Works* v. *Abraham & Straus*, 107 F. 2d 940 (C. C. A. 2); *id.*, 107 F. 2d 944 (C. C. A. 2), certiorari denied, 308 U. S. 621.[15]

(c) The *Hazel-Atlas* case not merely affirms, contrary to petitioner's contention (Pet. pp. 62-63), the power of a court of appeals, when fraud has been perpetrated upon it, to direct the district court to vacate the judgments and dismiss the complaints, but at least inferentially requires that such action be taken. In that case, the fraud which consisted of the publication of an article commendatory of the patent and purported to be written by a

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[15] Although it does not deny that it was accorded the "usual safeguards of an adversary proceeding" at the hearings, petitioner does claim that the proceeding generally resulted in a deprivation of its property without due process of law (Pet. pp. 63-65). The record, however, reveals that petitioner was accorded procedural due process, although such protection was provided by "improvised and rough and ready substitutes for the usual and regular procedure of the courts" (Pet. pp. 64-65); petitioner was notified of the charges and it was afforded opportunities to to make motions addressed thereto, which it fully exploited (see *supra*, pp. 5-9). It is interesting to note that petitioner, at this point, urges that due process includes the right to an appellate review (Pet. p. 64) although elsewhere it concedes that such reviews are a matter of grace and not required by due process (Pet. pp. 32-36).

disinterested person, was held to call "for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced." 322 U. S. at 250;[16] see, also, *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240; *Precision Instrument Co.* v. *Automotive Co.*, 324 U. S. 806; *Mas* v. *Coca-Cola Co.*, 163 F. 2d 505 (C. C. A. 4). As the court below commented, "How much more deserving of condemnation is the conduct of the patentee in the instant case which was directed against the integrity of the court itself" (Op. 40).

2. *Factual Questions*: The factual questions raised by Universal do not warrant an exception from the usual rule against granting certiorari to review matters of fact. The findings here that Universal employed Kaufman for the purpose of improperly influencing Davis' actions and that Davis was so influenced are supported by ample evidence, see *infra* pp. 17-26. These findings were made by an unanimous court composed of three judges who normally do not sit in the Third Circuit, who were specially designated by the Chief Justice to act in these cases, and who themselves heard the testimony and observed the demeanor of the witnesses in the course of direct and cross examination. Cf. Rule 52(a) of the Federal Rules of

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[16] The Court went on: "To grant full protection to the public against a patent obtained by fraud, the patent must be vacated" (322 U. S. at 251).

Civil Procedure. Moreover, these findings, independently arrived at by the court below on the basis of the evidence introduced at the hearings, are in harmony with the conclusions of the regular members of the Third Circuit, sitting *en banc*. Although the order based on the master's report has since been vacated, the report itself as an inquiry into whether the judgments were tainted by fraud and corruption has not been set aside.

That the ultimate findings of the court below are supported by ample evidence is, we submit, clear from the court's findings of subsidiary facts.[17] Since most of the facts are undisputed, the primary area of possible dispute lies in the inferences and conclusions to be drawn from these basic facts, and as to these, the unanimous reasoning of the court below by which these conclusions were reached is, we submit, patently sound.

(a) *Universal's Employment of Kaufman*: The court's finding that Universal employed Kaufman in order that he might influence Judge Davis improperly in these cases may be summarized as follows: Frank L. Belknap, who had charge of Universal's legal staff in the United States, sought in 1932, according to Kaufman, an appointment with

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[17] It is to be noted that the events here involved occurred in 1935, 13 years prior to the hearings below. By that time, many of the important participants, such as Judge Haight and Mr. Belknap, had died.

Kaufman (Op. 23),[18] who for many years prior to the *Root* cases had been a close associate of Judge Davis (Op. 21),[19] and retained him as an additional member of its very competent and adequate staff of lawyers in the *Root* cases (Op. 23).[20] These cases were test cases, and were of the greatest impor-

[18] Kaufman lived in Scranton, Pennsylvania, where he maintained a law office since 1905. He had served as a referee in bankruptcy from 1913 to 1934, and in the period from 1909 to 1939, he was attorney of record in 17 cases in the Court of Appeals. In 1933, when he was appointed receiver in bankruptcy in S. W. Strauss Company, he moved to NewYork City where Strauss' business had been conducted and from then until after 1940, his main occupation, apart from the receivership, was buying and selling securities on the stock market. (Op. 23.)

[19] The association included Judge Buffington and Kaufman's brother, David. The four men visited in each other's houses and offices and spent all or part of February with each other at the same resort in Miami, Florida, in 1935, 1936, and 1937. Their intimacy was well known in legal circles in the Third Circuit.

[20] The staff consisted of former Judge Thomas G. Haight, of Jersey City, former Judge Hugh M. Morris, and Eugene E. Berl, of Wilmington, Delaware, and William F. Hall and Charles S. Thomas, of Washington, D. C. Each lawyer was well qualified for the part he was employed to play. Judge Haight was an eminent and successful patent lawyer, especially in the Third Circuit, and took the lead in the preparation and trial of these cases in both the District Court and the Court of Appeals. Judge Morris was an experienced patent lawyer and actively participated in the preparation and trial of these cases in the District Court. Mr. Berl acted as local attorney and was in a position to furnish all the assistance needed by Universal at the seat of the District Court. Mr. Hall was very active in the litigation and argued the cases in both courts, confining his argument to the scientific aspects of the issues of validity and infringement. Mr. Thomas also participated in the trial of the cases in the District Court and in the prepara-

tance to Universal. An adverse decision of the Third Circuit would have destroyed the lucrative licensing system, which Universal was establishing.[21] (Op. 21.) At that time, neither the character of the service nor the fee to be paid was fixed, but it was understood that Kaufman was not to accept employment from other oil companies (Op. 23). When Belknap told Hiram J. Halle, Universal's president, of Kaufman's retention in May 1933, Halle agreed to Kaufman's retention but made no arrangement with him either as to services or fee.[22] The first time that Kaufman approached Halle in person was on April 15, 1935, after the *Root* cases had been argued in the Court of Appeals and were pending decision. (Op. 24.)

Apparently the reason why there were no arrangements made with Kaufman as to the services he was to perform was that there was no need at that time or later for Kaufman's services in these cases or "indeed for any legitimate service that he was competent to render" (Op. 23). Kaufman did not live in Delaware and could not efficiently perform the work of local counsel. He had neither the

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tion of briefs for the Court of Appeals. None of these lawyers knew Kaufman, except Haight, who had been introduced to him by Judge Davis at a lawyers' dinner in New York in 1930 and 1931. (Op. 21-23.)

[21] After the case was won, Universal sent copies of the opinion to prospective licensees and large sums were paid to Universal in settlement of past infringements (Op. 21).

[22] There is no correspondence or documentary evidence relating to Kaufman's employment by Belknap or Halle.

training nor the experience or ability to understand or present the difficult scientific questions or the legal questions which the *Root* cases involved. Upon his appointment as receiver in bankruptcy in the S. W. Strauss Company in 1933, Kaufman devoted his time, apart from the receivership, to the buying and selling securities on the stock market. As a matter of fact, he rendered no service whatsoever to Universal in these cases from the beginning to the end of the litigation. He had no contact with any of the other lawyers except for two casual inquiries by him as to the progress of the litigation and for a conference just before argument in the Court of Appeals, when it was decided not to put his name on the brief. (Op. 23-24.)

Despite his failure to perform any services, Kaufman was paid $30,000 by Universal in connection with these cases (Op. 24). After Judge Davis' opinion in Universal's favor was filed on June 26, 1935, Kaufman called upon Halle, Universal's president, and asked for a fee of $35,000 on the basis of $10,000 a year for the three and one-half years which had elapsed since Belknap had retained him. Halle suggested $25,000, contingent upon denial of Root's petition for certiorari. A check for this amount was delivered to Kaufman in Universal's New York office on October 22, 1935, the day after this Court denied certiorari (296 U. S. 626). This payment was supplemented by an additional $5,000 on July 27, 1936, when Kaufman asked Halle to restore the $10,000 cut from his

original demand. (Op. 25-26.) In contrast to this fee of $30,000 paid to Kaufman, who had rendered no legal services in the cases,[23] the following fees were paid to the lawyers who actually did the work: Haight, $86,300; Hall, $54,712; Thomas, $24,143; Morris, $12,708 and Berl, $1,073 (Op. 26).

All the evidence which we have just partially summarized is clearly ample, we submit, to support the court's conclusion that "Kaufman was employed or retained by Universal for the purpose and with the expectation that he would exercise upon Judge Davis an improper influence in order to secure favorable judicial action in the *Root* cases. There is no other reasonable explanation for the relationship or for the large fees that were paid him. He possessed nothing of value to offer Universal, except his intimacy with the members of the court. All phases of the litigation were in the hands

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[23] Kaufman also received additional fees of $20,000 from Universal in 1936. Ten thousand dollars was paid on March 18, 1936, after Kaufman had been consulted in regard to the proper district in the Third Circuit in which a suit against the Doherty interest should be brought, and had betrayed ignorance of the well known rules of venue in patent cases. In that case, Kaufman served as local counsel, filed a complaint and various motions but did not prepare them. In the same case, Haight was paid $3,000, Hall $75, and Morris and Thomas $2,500 each. The additional $10,000 was paid on December 3, 1936, representing, as explained by Universal, Kaufman's 1937 retainer paid in advance, pursuant to Kaufman's request because he expected large stock profits in 1937. At the time, Halle, Universal's president, told Kaufman that this was the last retainer that Universal would pay. Thus a total of $50,000 in all between October 22, 1935 and December 31, 1936, was paid Kaufman by Universal. (Op. 26-27.)

of able lawyers and Kaufman was incompetent to assist them in any legitimate way even if he had tried to do so. In fact, he made no lawful contribution whatsoever." (Op. 28.)[24]

(b) *Kaufman's payments to Davis*: Universal's purpose in retaining Kaufman, that he should improperly influence Davis, was achieved, the court found, by Kaufman's payments to Davis through the indirect means afforded by the so-called Stokley transactions. As to these, the court found: In February, 1935, shortly after the argument but before the decision in the *Root* cases, while both Davis and Kaufman were in Florida, Davis learned that his cousin C. L. Stokley, a grower of citrus fruit, was threatened with loss of certain property through foreclosure proceedings instituted by the local authorities on account of a $29,000 paving assessment. At that time he promised Stokley to try to secure a loan for him from a friend. After his return to Philadelphia, Davis entered into active correspondence with Stokley and the municipal authorities as

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[24] The court rejected as "frivolous" Universal's explanation of the $25,000 payment as being made to avoid a law suit for fees, such as those brought by former Senator James Reed of Missouri and W. P. German, each for a million dollars, for, the court pointed out, he was without shadow of any claim or any qualification for the work. Moreover, he was kept on the payroll and given an additional $25,000 without rendering any substantial legal service. It also considered "idle" the suggestion that Universal had retained Kaufman to prevent his employment by a competitor, for he had nothing to offer an adversary other than the illicit influence which Universal had secured for itself. (Op. 27-28.)

to the acceptance of a smaller amount to compromise the assessment, but it was not until October 4, 1935, that Davis wired the town that $10,000, the sum which the town had agreed to accept, had been definitely promised.[25] On October 24, 1935, two days after Kaufman had been paid by Universal (*supra*, p. 20), Davis arranged a meeting in his office between Kaufman and Stokley who then met for the first time. Pursuant to the agreement between them there drawn, whereby Kaufman agreed to loan $10,000 to Stokley at 8% per annum and Stokley agreed to make certain conveyances of property as security, a check for $10,000[26] was thereafter delivered to Stokley and deeds for the property received and sent to Kaufman. (Op. 29).

During this period and thereafter until the Government's investigation into Davis' affairs, Kaufman evinced no interest at all in the transaction other than to enter the agreement and advance the money. Ordinarily, Kaufman was persistent in pressing defaulting creditors for payment, but here he took no action although the agreement called for annual payments of $2,500 and Stokley made

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[25] The undisputed evidence shows that beginning June 1935, Stokley wrote frantic letters to Davis, begging for a loan as soon as possible; that Davis at least as early as August 1935 had asked Kaufman to make the loan, and that during all of this time, Kaufman, had on deposit in various banks over $100,000 which was uncommitted. (Ex. 109; tr. 2271.)

[26] The check was drawn on the account in which Kaufman had deposited the $25,000 he had just received from Universal. That account prior to this deposit contained only $5,568.68 (Ex. 91; tr. 2271).

no payments either of principal or interest to him until the summer of 1939. This payment was made after the Government's investigation of Davis had been started, and after Kaufman and Stokley had dined together at Davis' house in Trenton in 1939. Kaufman claimed he wrote Stokley many times before 1939, but none of the letters were produced and Kaufman's secretary, who kept his books, testified she never heard of Stokley before he made a payment of $600 on the loan on June 18, 1939. Kaufman produced two letters from Stokley dated April 7, 1937, and May 11, 1938, referring to the $10,000 loan and his difficulties in making payment. Unlike all other letters produced by Kaufman, these were written in lead pencil and were not accompanied by envelopes in which they were mailed. (Op. 32.)

In contrast, the court went on to point out that Davis' records show that Stokley paid Davis $200 on June 22, 1936, $200 on July 7, 1936, and $400 in February, 1937. Davis testified this was paid on account of the principal of another loan, a $4,000 loan, which he had made to Stokley;[27] the court, however, found that these sums were payments on

[27] After the $10,000 loan from Kaufman to Stokley, Stokley was threatened with foreclosure of certain of his orange groves on account of another debt which he owed and for which he needed $4,000. Davis, himself insolvent at the time as a result of stock speculations which came to a disastrous end in the financial crash of 1929, borrowed the money from Samuel Ungerleider, a New York broker who was his friend. He loaned it to Stokley at 8% per annum for which he took certain deeds

account of interest on the $10,000 loan. These payments, it pointed out, correspond in amount to overdue semi-annual payments of interest on $10,000 at 8%. They could not have been interest payments on the $4,000 loan, since the interest on that loan for the first year ($320), was paid by Stokley to Davis on February 9, 1937. Nor could they, the court stated, be payments of principal on the $4,000 loan, since in March and April, 1937, Stokley sent Davis two checks of $500 each, marked as the first and second payments on the property which secured the $4,000 loan. Other circumstances, the court found, corroborated the conclusion that these payments were actually interest on the Kaufman loan but paid to Davis. A statement prepared by Stokley's son showed a payment of $400 to Davis on one-half year's interest on the $10,000 loan on February 28, 1938, but this item was omitted from a subsequent statement concerning the same period, prepared by Stokley for submission to the Grand Jury. In addition, the stub of this check in the Stokley checkbook had been completely torn out and destroyed, apparently to conceal this payment to

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as security. Davis never repaid the $4,000 to Ungerleider. (Op. 30-31.)

In the spring of 1937, Ungerleider also arranged a composition with the banks to which Davis owed $85,000, for the sum of $37,674.50, and advanced the money to put it into effect. Davis gave notes for the loan and assigned certain life insurance policies to Ungerleider. Although Ungerleider has recovered certain sums, a balance of $17,000 has never been repaid. (Op. 30.)

Davis. Furthermore, Kaufman falsely testified during the Davis investigation that in July, 1936, he received a $200 payment from Stokley on the $10,000 loan, and although Kaufman further testified that he deposited the check in a certain bank, the bank's officers testified that no such deposit had in fact been made. In this proceeding Kaufman claimed he had no recollection of the deposit of the check. (Op. 31-32.)

This evidence again is ample to support the court's finding that "there can be no reasonable doubt, especially when the timing of the loan is considered, coming as it did immediately after the receipt by Kaufman from Universal of the sum of $25,000, that the $10,000 loan was designed to provide an indirect means for the payment from Kaufman to Davis, and a false front behind which the true nature of the payment was concealed" (Op. 33).[28]

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[28] Also pertinent on this phase of the case, is the illicit combination between Davis and Kaufman in regard to the so-called Fox transactions which the court below describes in detail (Op. 33-39). William Fox, the movie magnate, confessed to his part in this conspiracy, and pleaded guilty thereto (Op. 36).

CONCLUSION

The court below had jurisdiction to proceed as it did in these cases, and its findings are supported by ample evidence. The petition for writs of certiorari should therefore be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 439-440

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.
Intervenor-Respondent.

PETITION FOR REHEARING

RALPH S. HARRIS,
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JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

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PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner, Universal Oil Products Company, prays this Court for a rehearing pursuant to Rule 33, Subdivision 2, of this Court. The petition will be confined to what are believed to be substantial grounds available to petitioner although not previously presented.

On December 28, 1946, William Whitman Company, Inc. commenced suit against petitioner in the United States District Court for the District of Delaware alleging, *inter alia,* (a) that a certain license agreement entered into be-

tween it and petitioner in April 1937 had been induced by the fraudulent representation by petitioner that the judgments of affirmance rendered by the Court of Appeals for the Third Circuit on June 26, 1935, in favor of petitioner and against Root Refining Company were honestly procured, or (b) that said license agreement was entered into between William Whitman Company, Inc. and petitioner upon a mutual mistake of fact.

In June, 1947, the Court of Appeals for the Third Circuit set aside its 1944 order vacating the *Root* judgments for fraud and required petitioner in spite of the absence of "parties" to show cause why the *Root* judgments of affirmance should not be set aside for fraud.

On December 30, 1947, William Whitman Company, Inc. moved the Court of Appeals for the Third Circuit for leave to intervene in the proceedings at bar with respect to the charge that the judgments of affirmance in the *Root* case had been procured by fraud.

These proceedings, at the time of the motion for intervention, were entirely without parties in the constitutional sense. The original party defendant, Root Refining Company, had settled its case with petitioner in 1939 and had reaffirmed and implemented that settlement in 1944 (328 U. S. 575, 577). Certain attorneys who had appeared ***amici curiae*** in the earlier phases of the proceedings (*ibid.*) had withdrawn.

The United States of America had filed an appearance through the Department of Justice as *Amicus Curiae*.

It was in this posture that hearings were had early in 1948 by the Court of Appeals for the Third Circuit, as specially constituted, upon the petition of William Whitman Company, Inc. for leave to intervene as aforesaid.

In opposition to Whitman's motion, petitioner urged that, in the absence of parties, there was no case or controversy before the court in the constitutional sense (see our main brief upon petition for *certiorari* filed December 1, 1948, pp. 56-62) and hence no justiciable controversy with respect to which Whitman might properly be allowed to intervene.

In taking this position petitioner in no wise denied the inherent right of the Court of Appeals to unearth a fraud committed upon it and to unearth it effectively (328 U. S. 575, 580). Petitioner maintained, however, that it was neither lawful nor just that William Whitman Company, Inc., which was engaged in private litigation with petitioner in a plenary action previously commenced by Whitman in Delaware, should be associated with the instant proceedings in the Court of Appeals. To hold otherwise, petitioner urged, would result in a judgment *in vacuo* in a proceeding designed exclusively to vindicate the honor of the Court of Appeals.

The Court of Appeals overruled petitioner's objections and granted the intervention of Whitman on April 6, 1948.

I.

We do not at this time reargue the extent to which the Court of Appeals had jurisdiction, in the interest of the honor and integrity of that court, to investigate whether or not the court's judgments were tainted with fraud and to punish officers of the court and litigants by appropriate action.

That the court may have had such jurisdiction, however, is very far, we respectfully submit, from justifying the proceedings as a constitutional case or controversy *as*

far as the private litigation between petitioner and Whitman in the pending Delaware action is concerned.

It is our contention that the judgment of the Court of Appeals is not *res adjudicata* as between Whitman and petitioner, although the court below appears specifically to have so held (169 F. 2d 514, 525). We respectfully urge that the Court of Appeals be reversed in this particular.

II.

Moreover, it is maintained by *Amicus Curiae* and by Whitman that this Court, in denying petitions for writs of prohibition, mandamus and *certiorari* on November 10, 1947 (332 U. S. 813), necessarily determined that a case or controversy in the constitutional sense existed in the present proceeding. This Court has consistently held that the denials of such petitions are without legal significance with respect to the merits of the matters sought to be presented to the court. *Ex Parte Abernathy,* 320 U. S. 219; *Atlantic Coast Line R. Co.* v. *Powe,* 283 U. S. 401, 403-4; *United States* v. *Carver,* 260 U. S. 482, 490; *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258; *Accord: House* v. *Mayo,* 324 U. S. 42, 47-8.

The erroneous assumption that the denial of such petitions necessarily implied an adjudication upon the points sought to be reviewed has been embodied and perpetuated in the opinion of the court below in these proceedings. For example, the court stated, 169 F. 2d 514 at 523:

> "This interpretation [that there was a case or controversy below] of the Supreme Court's position [in 328 U. S. 575] is in harmony with its subsequent rejection of Universal's petition for writs of pro-

hibition and mandamus, directed to this court, wherein Universal again advanced the contention that this court had acted in excess of its jurisdiction."

It is humbly submitted to this Court that it should grant this petition in order to reverse the lower court in this respect and thus prevent, in litigation involving petitioner and others, other courts from applying the doctrine of *stare decisis* in respect of the lower court's construction of this Court's denial of previous petitions. Unless this Court shall do so, then in addition to the error already perpetrated it will be claimed, and other courts may hold, that this Court's recent denial (U. S. , decided January 17, 1949) of the petition for writs of *certiorari* is similarly decisive of the contested questions in the proceedings below.

For all the foregoing reasons petitioner respectfully prays that this Court grant this petition for rehearing and issue its writs of *certiorari* for the purpose of determining the questions herewith submitted.

Respectfully submitted,

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

By RALPH S. HARRIS,
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JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

January 26, 1949.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

RALPH S. HARRIS